Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

SUPER SULKY, INC.,
Petitioner,
vs.
U.S. TROTTING ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the United States Supreme Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the heightened standard for proving antitrust "conspiracy" in cases involving ambiguous "parallel" conduct, as articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986) and *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), applies in cases where the alleged conspirators acted jointly and collaboratively to devise the restraint alleged to violate Section 1 of the Sherman Act.

2. Whether the creation of a product-banning rule by a non-profit sports sanctioning association whose for-profit members include all participants in that sport in the United States, as well as executives of certain companies that manufacture competing products, *ipso facto* constitutes an "agreement" in restraint of trade, such that, in a civil action for violation of Section 1 of the Sherman Act, the analysis must focus on the restraint's "reasonableness" rather than on whether a "conspiracy" existed.

3. Whether a non-profit sports sanctioning association's rule that completely bans from that sport a popular product already in use is *prima facie* anti-competitive, thus shifting the burden to the sports sanctioning association of establishing a sufficiently procompetitive justification for the ban.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as noted in the case caption. The petitioner, Super Sulky, Inc., is a now-defunct corporation, and has no parent companies or subsidiaries.

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Petitioner, Super Sulky, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 174 F.3d 733 (6th Cir. 1999) (App. A). The opinion of the District Court granting the respondent's motion for judgment as a matter of law is not reported, but is attached hereto as App. B. Also attached hereto, as App. C, is the District Court's order denying the respondent's motion for summary judgment, but limiting the petitioner's proofs of conspiracy, as discussed *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1999 (App. A). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with a foreign nation, is hereby declared to be illegal....

Section 4 of the Clayton Act, 15 U.S.C. § 15 (a), provides in relevant part:

> ... any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States... and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee....

The complete texts of the foregoing statutes are set forth in App. E and App. F, respectively.

STATEMENT OF THE CASE

This case involves the creation, by a non-profit sports sanctioning organization, of a product design standard that had the purpose and effect of banning the type of racing "sulky"[1] (the Cheetah Super Sulky or "Cheetah") invented by the petitioner entirely from the sport of harness racing.

The petitioner, Super Sulky, Inc., sued the organization, the United States Trotting Association ("USTA"), for unlawful conspiracy in restraint of trade under Section 1 of the Sherman Act.

The complaint alleged that the creation of the rule which expressly and implicitly banned the Cheetah style sulkies was the result of a "conspiracy" between the USTA, competing

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[1] A sulky is the two-wheel cart attached to a harness racing horse in which the driver sits during a harness race.

sulky manufacturers, and various other individuals who participated in advocating and creating the rule. As the other alleged conspirators were dismissed for lack of personal jurisdiction, the case proceeded to trial solely against the USTA. However, due to the way the complaint was pled, and despite petitioner's arguments in its brief opposing summary judgment, the trial court (which denied summary judgment) required petitioner to limit its proofs of "conspiracy" to proving that the USTA conspired with one or more sulky manufacturers. The court would not permit petitioner to establish, alternatively, the theory inherent in the facts of this case: that the rule-making process of a private standard-setting organization that destroys the trade freedom of its members necessarily constitutes a "conspiracy" of the membership. Petitioner objected to this ruling, thus preserving this question for appeal.

The case went to trial before a jury. After two weeks of testimony, the jury returned a verdict for the petitioner. Subsequently, the trial court granted the respondent's motion for judgment as a matter of law on the ground that petitioner failed to prove a "conspiracy" under Section 1 of the Sherman Act. The trial court's judgment was affirmed by the Sixth Circuit Court of Appeals, thus giving rise to this petition for writ of certiorari.[2]

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[2] The complaint also alleged, and the jury also found, that the USTA's actions constituted tortious interference with the petitioner's existing and

The USTA is a private non-profit sports sanctioning organization whose 30,000 members include all persons in the United States who participate in the sport of harness racing as owners, trainers, drivers, and breeders of harness racing horses. All harness racing tracks in the United States are also members, as well as many harness racing officials. Although the membership does not include sulky manufacturing *companies*, most of the sulky company *executives* who testified at trial *are* USTA members.[3] Moreover, although the USTA itself is a non-profit organization, its members participate in the sport *for profit*; and its rules naturally cater to its members' profit-making interests.

Official governance of harness racing is legislatively granted to state racing commissions. Nevertheless, the USTA has the ability to substantially affect the market for racing sulkies. To participate in harness racing as an owner, driver, or trainer, the USTA -- which registers horses and licenses drivers and trainers -- requires such individuals to be USTA members; and it is the owners, drivers, and trainers who comprise the entire sulky consuming market. The USTA also

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prospective business relations under Ohio law. As with the antitrust verdict, however, the district court also granted the USTA judgment as a matter of law on these claims, which ruling the Sixth Circuit affirmed.

[3] For instance, both petitioner's president, Craig Stein, and William Card, the president of the alleged co-conspirator, Jerald Sulky, Inc., are USTA members.

has enforcement power with respect to its rules, as it bylaws permit it to fine, suspend, or expel its members for rule violations. Thus, where, as here, the USTA designs a rule creating a product standard that has the purpose and effect of banning from harness racing a product whose sole function is its use in harness racing, the USTA's rule effectively ousts that product from the *only* market in the United States where it is in demand.

The rule at issue had its genesis in a controversy that arose in the early 1990's with the advent of two new sulky designs known as "bent-shaft" and "Cheetah" sulkies. There was nothing remarkable (or threatening to the integrity of the sport) about the fact that new style sulkies were being introduced. Since the inception of harness racing in the late 19th century, sulky designs were *always changing*. Indeed, the traditional style sulky that had dominated the marketplace for fifteen years prior to the appearance of the Cheetahs and bent-shafts had itself been a maverick when introduced in the 1970's. Eventually, however, its acceptance grew and it ousted the then-traditional style to become the industry leader, though a number of less popular styles remained in use at the tracks.

Prior to the advent of Cheetahs and bent-shafts, the USTA, which has been in existence since the 1930's, had rarely endeavored to impose standardization upon sulky designs. The USTA had *no* sulky design rule in existence between 1939 and 1974. In 1975, in connection with the

appearance of a single-shaft sulky, the USTA created a rule specifying sulky dimensions, and banning single-shaft sulkies. This rule, however, was abandoned by 1979 in favor of a rule defining a sulky simply as a "dual-shaft, dual wheel racing vehicle." This was the rule in existence when the Cheetahs and bent-shafts came out, and it was undisputed that both new styles fully complied with this rule.

The controversy that arose upon introduction of the Cheetahs and bent-shafts was due to their superior qualities, particularly their perceived speed advantage. The bent-shafts came out first, giving the traditional style sulkies a run for their money. A year later, the Cheetahs appeared, quickly edging out the bent-shafts in popularity. In the year Cheetahs were in use prior to the ban, horses pulling the Cheetah broke several harness racing records, and petitioner Super Sulky, Inc. took the lead in sulky sales. So popular was the Cheetah (a style created by the petitioner and never equalled in popularity by the "cheetah-style" imitators of other sulky manufacturers), that its largest distributor, Big D's Tack and Harness Supply, was selling "all the Cheetahs [he] could get as long as [he] could get them," while, at the Chicago paddocks, horsemen who did not own a Cheetah were bidding to rent them for prices four to ten times higher than customary rental fees.

The impetus to ban the Cheetahs began in Chicago where several disgruntled drivers complained to their horsemen's association that they felt the Cheetahs to be

"unsafe." The president of the horsemen's association gave the complaining drivers leave to survey the other drivers as to their opinions of the Cheetah's safety, and the alleged survey (whose actual existence was doubtful as it was never produced, and which, in any case, selectively omitted to elicit opinions of certain drivers who supported the Cheetah) came back with the verdict that the Cheetah should be banned as unsafe, without any evidence whatsoever to support this claim. Nevertheless, the horsemen's association recommended to the Chicago tracks that the Cheetahs be banned, and the tracks complied, "pending an investigation by... the USTA."

This was the climate in which the USTA undertook to create a rule standardizing sulky design. At its annual meeting a month after the Chicago ban, the USTA hosted a "panel discussion" on sulky safety and standardization. The composition of the panel was curious, to say the least. Despite the Cheetah's immense popularity, no one on the panel spoke in its favor. Rather, all those invited to speak expressed disfavor of the new style sulkies. Among those invited to speak, the only sulky manufacturer was the vice-president of petitioner's competitor, Jerald Sulky Company. Jerald, the oldest and largest sulky manufacturer, had dominated the market with its traditional style sulky for much of the past fifteen years; and, indeed, had been the undisputed market leader in Chicago where the anti-Cheetah campaign first surfaced. The Jerald representative informed the

audience that Jerald did not approve of the new-style sulkies, but that it reluctantly designed its own version of the Cheetah due to "horsemen's demand." Although there was an attempt at trial to establish that Jerald's "cheetah-style" sulky, the Jet, was a wild market success (and hence that Jerald had no motive to conspire in banning the Cheetah), the owner of Big D's (which was also Jerald's largest dealer) testified that petitioner's Cheetah Super Sulky outsold the Jets by a 4 to 1 ratio; and that the only time customers purchased Jets was if Cheetahs were unavailable or if they had a special loyalty to Jerald. Big D's owner also testified that, prior to designing the Jet, Jerald's president complained that Big D was not moving Jerald's product. Big D's response was that if Jerald wanted to compete with Cheetah, it would have to make a cheetah-style sulky.

Following the panel discussion, the USTA created a committee (the Industry Wide Sulky Committee or "IWSC") to investigate sulky safety and standardization, and to create a sulky design rule that the USTA could adopt at its next annual meeting. Although the committee was made up of 16 members, it was undisputed that the dominant voices on the committee were six of the members appointed by the USTA's liaison officer -- all of whom either disfavored the new style sulkies, were friendly with Jerald's executive officers, or arrived with a preconceived agenda to ensure that the Cheetahs (and, to a lesser extent, the bent-shafts) were banned. This was true despite the fact that a large contingent

of the USTA membership preferred the Cheetahs and bent-shafts to the conventional sulkies, publicly questioned the committee's objectivity, and even supplied the committee with evidence that there were *fewer* accidents at the tracks since the advent of Cheetahs and bent-shafts.

Although at least one of the committee's meetings was opened to the public and solicited information from industry participants including sulky manufacturers, the pivotal discussions formulating the rule occurred behind closed doors. This much, however, is undisputed: from the early drafts of the rule -- and before any polling of drivers' opinions was undertaken -- the committee had determined to make the traditional sulky style *the* standard, and that the rule would contain measurements that would necessarily ban the Cheetah. This fact was reflected both in the testimony of committee members, and in marginal notes on an early draft of the rule, indicating that a particular measurement "Eliminates 'Cheetah' style [sulkies.]"

Throughout the process, the ostensible reason for banning the Cheetahs (and, to a lesser extent, the bent-shafts) was the notion that these sulkies were somehow unsafe. Yet, though there was much "jawing" on this subject, the committee members ultimately admitted they had no concrete evidence of the Cheetah's unsafety. Indeed, the one driver on the committee who had actually driven a Cheetah, and who vociferously advocated its demise, had driven it numerous times without a problem, whereas he had been involved in 20-

50 accidents while using other sulkies. In the end, the only "evidence" the USTA could point to of the Cheetah's alleged unsafety was the results of an anonymous "class A driver's poll" sent out *after* the proposed rule had been drafted and circulated at the tracks. This poll, anonymous hearsay though it was, purported to express a majority opinion that Cheetahs were unsafe and that the traditional style sulky should be the standard.

Meanwhile, shortly after the IWSC was created, and prior to the committee's first draft of the rule, a number of meetings were taking place at various locations in the harness racing circuit. Some involved efforts to convince the New Jersey State Racing Commission to ban the Cheetahs and bent-shafts (efforts which, having failed, were tabled until after the USTA adopted the ban); some were merely meetings between local drivers' associations, sulky manufacturers, and other participants in the harness racing industry. Although representatives of Cheetah were present at such meetings as were publicized, they were not invited to, and were not in attendance at, certain of the other meetings. The representatives of Jerald, on the other hand, were ubiquitous figures at every meeting, often joining with other anti-Cheetah advocates, such as IWSC committee member (and "winningest driver") John Campbell, to advocate the designing of a rule making the traditional style sulky -- of which Jerald's was the industry prototype -- the standard.

One of the meetings from which Cheetah was excluded

occurred at Monmouth Park in New Jersey. The petitioner's witness, Vinnie Tantillo, the manufacturer of a non-traditional sulky, accidentally heard of it, and arrived after it was already over. There he encountered IWSC committee member, Placido Salerno, walking with Jerald executives and other sulky manufacturers. Salerno announced to Tantillo that "Cheetah is finished." This statement was confirmed by one of the manufacturers' representatives, who told Tantillo that "they had the meeting because they were going to get together and ban the sulky. They were going to get the USTA to ban it." Tantillo also testified that, prior to trial, the USTA's liaison officer indirectly (through a third party) informed him he need not respond to the plaintiff's trial subpoena, as he resided outside the court's subpoena power.[4]

There was also evidence of a meeting between Jerald representatives and IWSC committee member, Phil Langley, at the Chicago tracks shortly after the IWSC was created. The result of this meeting was a typed-up set of sulky specifications, the measurements of which Jerald had provided to Langley based on the dimensions of the traditional Jerald sulky. Langley brought these sulky specifications back to the IWSC where they were incorporated into the rule's first draft with the intention of

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[4] Although this attempt to suppress an opponent's testimony gives rise to an inference that the USTA knew its defense was weak and unfounded, *see* Wigmore, *Evidence* § 278 (Chadbourne Rev. 1979), the courts below chose to ignore this evidence.

making the traditional sulky the prototype for the rule.

After the committee designed the rule and disbanded, the USTA liaison officer issued a press release concerning the committee's recommendations. The press release said nothing about standardization of sulky design for the benefit of parity in the sport (a justification which only came into the spotlight shortly before trial when the USTA hired as their advisory counsel an antitrust law professor). Rather, the press release described the IWSC's sulky design criteria as "safety standards." This was so despite the fact that the USTA lacked any concrete evidence that Cheetahs were less safe than other sulkies, and, indeed, possessed evidence that the conventional styles were more dangerous than Cheetahs and bent-shafts. That the committee intended the proposed rule as a ban of the Cheetah is expressed in the press release's statement that the standards approved by the IWSC "would not approve use of 'cheetah' style, or most 'bent' shaft style sulkies."

Shortly after the press release issued, sales of Cheetahs plunged dramatically. Within a month, petitioner, Super Sulky, Inc., a company formed solely to make and market the Cheetah, went out of business. The following February, at its annual meeting, the USTA adopted the IWSC's recommended rule without taking any further evidence. Although state racing commissions ultimately adopted the USTA's ban of Cheetahs and bent-shafts, this happened after Super Sulky, Inc. had already gone out of business as a direct result of the IWSC's proposed sulky design rule.

It should also be noted that the district court held that the relevant market was the market for harness racing sulkies. This market is highly concentrated and demand inelastic. The total number of sulkies sold annually is approximately 4,300. At the time petitioner's Cheetah emerged in this market, there were only four major sulky manufacturing companies (and several less significant ones). In the twelve months it was in business, Super Sulky, Inc., a start-up company, sold some 518 sulkies, and its sales were increasing at a rate of 20% a month. Thus, the effect of the IWSC's proposed rule was to drive from the market a strong competitor whose innovative product had appealed to consumers and threatened the status quo.

REASONS FOR GRANTING THE WRIT

I. This Case Offers This Court The Opportunity To Define The Limits Of The "Conspiracy" Analysis Set Forth In *Matsushita* And *Monsanto*, Where, As Here, The Facts Do Not Involve Ambiguous "Parallel" Conduct, But Joint And Collaborative Conduct That Pervades The Initiation, Execution, And Fulfillment Of The Plan.

This case involves the question of whether the petitioner's evidence was sufficient to establish a jury question of "conspiracy" -- a question which turns on whether

the lower courts applied the appropriate "test" for determining whether reasonable minds could conclude that a conspiracy existed.

The district court struggled mightily with this question, finding, at the summary judgment and directed verdict stages, that the evidence was sufficient to create a factual issue as to whether agents of the USTA[5] "conspired" with one or more sulky manufacturers to restrain trade by creating the rule that banned the Cheetah. Post-trial, however, the district court second-guessed its earlier ruling. The district judge found that the petitioner's evidence failed to satisfy the conspiracy "test" set forth in the Sixth Circuit decision of *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990). *Riverview Investments* imported the "conspiracy" analysis from *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 572 (1986) and *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) (cases considering the conspirators' motives, economic benefits, and independent business reasons for acting as they did as factors in determining whether "conspiracy" could be inferred from ambiguous "parallel" conduct) to a case where the conduct of the parties was not

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The district judge properly instructed the jury that the USTA could be liable for the conspiratorial conduct of its agents (including IWSC members), as they acted on the USTA's behalf, and with the force of the USTA's reputation behind them. *See American Soc'y of Mechanical Engineers v. Hydrolevel*, 456 U.S. 556, 573 (1982).

merely parallel, but was more in the nature of joint and collaborative conduct. The district judge ultimately yielded to the *Riverview Investments* precedent, despite his misgivings: "I'm not satisfied as it's a completely correct statement of the law." (App. D, p. D-4).

The Sixth Circuit, however, entertained no such misgivings, finding that *Matsushita's* ostensible progeny, *Riverview Investments*, "effectively forecloses Super Sulky's antitrust arguments on appeal." (App. A).

Petitioner respectfully disagrees with that conclusion. The analysis which originated in *Monsanto* and *Matsushita*, does not logically (much less, *comfortably*) apply to cases which do not ask the trier of fact to infer conspiracy from ambiguous "parallel" conduct, but which instead involve joint and collaborative action that pervades the initiation, execution and fulfillment of the plan.

"Collaboration is the core of the conspiracy concept", 6 Phillip E. Areeda, *Antitrust Law* ¶ 1406a at 24 (1986) -- a fact which cases predating *Monsanto* and *Matsushita* clearly recognized. It has long been the law that joint and collaborative action, undertaken to achieve the anticompetitive objective, in and of itself proves the conspiracy, protestations that the conspirators were acting in their own self-interest notwithstanding. In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), where the district court found no conspiracy to exist because defendant GM could have independently undertaken the dealer-

compliance measures it undertook based on a "location clause" in the dealer franchise agreements, this Court rejected this explanation as beside the point. The Court stated:

> We do not decide whether the 'location clause' may be construed to prohibit a dealer... from selling through discounters, or whether GM could by unilateral action enforce the clause, so construed. We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and GM to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers to deprive franchised dealers of their freedom to deal through discounters if they so choose.... **** Whatever GM might... lawfully have done... is beside the point.

Id. at 139-140. This Court went on to reject the district court's reasoning that no conspiracy existed because each conspirator acted to promote its own self-interest. This Court stated:

> These factors do not justify the result reached. It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest.... And although we regard as clearly erroneous... the trial court's conclusory 'finding' that there has been no

> 'agreement' among the defendants and their alleged conspirators, **it has long been settled that an explicit agreement is not a necessary part of a Sherman Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.... **** Neither individual dealers nor the associations acted independently or separately. The dealers collaborated, through the associations and otherwise, among themselves and with GM,** both to enlist the aid of GM and to enforce dealer's promises to forsake the discounters... ****** This process for achieving and enforcing the desired objective can by no stretch of the imagination be described as 'unilateral' or 'merely parallel.'****** [W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell the public, we need not enquire into the economic motivation underlying their conduct.

Id. at 142-145 (emphasis added).

The problem in the instant case derives from the fact that the lower courts have lost sight of the teachings of *GM*. Since the decisions in *Monsanto* and *Matsushita* were handed down in the mid-1980's, many lower courts have doggedly adhered to the ambiguous "parallel" conduct analyses of those

cases, whether or not they "fit."[6] *Monsanto* and *Matsushita* involved situations where the plaintiffs sought to prove conspiracy through proof of ambiguous "parallel" conduct -- *i.e.*, through pointing out independent actions of the alleged conspirators that may have been taken due to an agreement on the one hand, or may have been taken due to independent interests on the other, and asking the trier of fact to infer the former rather than the latter. In such instances, *Monsanto* and *Matsushita* require that something more than the conspirators' ambiguous "parallel" conduct must be shown: there must be evidence "tending to exclude the possibility" that the conspirators were acting independently rather than pursuant to agreement.

To determine whether the evidence tended to exclude the possibility that the alleged conspirators were acting independently, *Monsanto* and *Matsushita* looked to such factors as the conspirators' motivation, whether the conspiracy made economic sense for them to engage in, and whether there were equally plausible "independent business reasons" for why the conspirators undertook the actions that each of them *independently* undertook. But the ultimate question in these cases still remained whether the alleged conspirators acted pursuant to an agreed course of conduct rather than

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[6] *But see Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 214, n. 32 (3d Cir. 1992) (requirements that plaintiff demonstrate economic interest and motivation to enter into agreement "insulate from liability coincidental, as opposed to concerted, parallel refusal to deal cases.").

independently of one another. **The Court in *Monsanto* and *Matsushita* was *not* suggesting that joint and collaborative conduct is any less a "conspiracy" because the conspirators had independent reasons for collaborating to achieve the restraint in question.**

Nevertheless, this is precisely what the *Riverview Investments* analysis suggests, and what the courts below effectively found to be the death knell to petitioner's theory in this case. The problem arises from the "test" which the court in *Riverview Investments* believed to flow from the holdings in *Monsanto* and *Matsushita*. The court in *Riverview Investments* stated that *Monsanto* and *Matsushita* together establish

> a two-part inquiry for evaluating the [existence of conspiracy] in an antitrust case: (1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Riverview Investments, at 483, *quoting Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987).

Petitioner submits that the foregoing test disregards the inherent limits of *Monsanto* and *Matsushita* and negates the rule articulated in *GM* that where joint and collaborative

conduct is pervasive in the initiation, execution, and fulfillment of the plan, the fact that each conspirator acted to promote its own independent interest is irrelevant to the question of whether conspiracy existed. Petitioner's position, moreover, does not render the conspirators' motivation entirely irrelevant to whether a § 1 violation occurred. Rather, the legitimacy of the conspirators' reasons for doing what they did should be tested under the "reasonableness" inquiry (*i.e.*, whether the procompetitive benefits of the restraint outweighed its anticompetitive effects), and not as a means for unraveling a finding of concerted action that otherwise plainly exists.

Accordingly, this case involves an important issue which this Court needs to address as to whether the conspiracy analysis set forth in *Monsanto* and *Matsushita* applies in cases where the joint and collaborative conduct is pervasive in the initiation, execution, and fulfillment of the plan.[7]

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[7] This issue is pivotal to the decision in this case. Below, the USTA argued its collaboration with manufacturers was not conspiratorial because: (1) no payoffs were involved; (2) the USTA had no reason to want to hurt Super Sulky; (3) much of the collaboration did not occur in secret; and (4) the USTA did not intend to violate the law. Yet none of these arguments should have undone the fact that the rule was the product of joint and collaborative conduct between the USTA's agents and others, including Jerald. This Court has long held that good motives themselves "will not validate an otherwise anticompetitive practice." *NCAA v. Oklahoma Bd. of Regents*, 468 U.S. 85, 101, n. 23 (1984). How, then, can an assertion of benign motivation negate a clear showing of collaboration? The simple

II. This Case Presents Important Questions Concerning If And When "Conspiracy" Is Inherent In The Rule-Making Process Of A Private Sports-Sanctioning Organization.

The great anomaly of this case is that the restraint in question -- the creation of a product-banning rule -- was clearly the result of concerted action by independent entities who came together for the avowed purpose of designing this restraint; and that, despite this fact, the lower courts found no "conspiracy" as a matter of law.

This anomaly results, in part, from how the lower courts chose to view a theory which petitioner believes inherent in the complaint. The lower courts held that petitioner could not pursue the theory that conspiracy was inherent in the USTA's rule-making process as it had not specifically been pled in the complaint. The courts below stated that permitting this theory to go forward when first articulated at the summary judgment stage would prejudice respondent because new material inquiries of fact would be raised. The Sixth Circuit, for instance, found that this theory

> would focus on the conduct of the USTA itself, not on its interactions with other parties. The

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answer is it cannot. "[T]he defendants' mistaken belief, no matter how sincere, that their collaboration improves competition should be immaterial to the tribunal's decision to enjoin it as an unreasonable restraint of trade." 7 Phillip E. Areeda, *Antitrust Law* ¶ 1504 at 377-378 (1986).

> USTA would no longer be viewed as a single entity. Instead, the motives, actions, and conversations of individual members would take on greater significance requiring new discovery.

(App. A). The Sixth Circuit also found that the "case law in this area is unsettled" as to whether the USTA should be treated as a single entity. *Id.*

Petitioner submits that the lower courts' analysis was incorrect. The theory that "conspiracy" is inherent in the rule-making process injects no new factual issues in this case. This Court has traditionally assumed the existence of concerted action in this type of case, and focused instead on whether the rule constitutes an unreasonable restraint of trade. Moreover, under the circumstances of this case, the USTA should not be treated as a single entity, as its membership comprises the entire sulky consuming market, whose individual trade freedom was stifled by the rule, not to mention certain executives of sulky manufacturing companies. Accepting review of this case would thus enable the Court to provide clear guidelines as to when a private sports sanctioning organization's rule-making process constitutes a "conspiracy."

Past decisions from this Court suggest that "conspiracy" inherently exists when private professional and trade associations create rules that govern their members' competitive conduct. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), for instance, this

Court stated:

> Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations.... There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.... **Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.** Accordingly, private standard setting associations have traditionally been the objects of antitrust scrutiny.

Id. at 500-501 (emphasis added).

Similarly, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1984), where the United States challenged the society's rule forbidding its members to engage in competitive bidding, the analysis *assumed* that the rule itself constituted an "agreement." As explained by Professor Areeda, the Court in *Professional Engineers*

> never asked whether the society as an entity had conspired with anyone, but saw the issue, obviously and correctly, as whether 'an agreement among competitors' restrained competition unjustifiably. It seemed obvious to the parties that

> the rule was a contract, combination, or conspiracy among the members.

7 Phillip E. Areeda, *Antitrust Law* ¶ 1477 at 344 (1986).

This pattern of presuming satisfaction of the "conspiracy" element, and proceeding to the "reasonableness" inquiry, recurs throughout this Court's cases involving rule-making by private standard setting bodies, and has carried over to its analysis of rule-making by sports-standard setting associations such as the NCAA. *See California Dental Ass'n v. F.T.C.*, __ U.S. __, 119 S.Ct. 1604 (1999); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); and *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).

Concerted action is presumed in such cases because the organizations' members each retain their individual market significance when they converge to design a rule governing each others' competitive conduct. Thus, treating the rule-making process as concerted action satisfies the concerns of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *Copperweld* recognized that the danger of concerted action is that it is "fraught with anticompetitive risks because it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id.* at 768-769.

Concerted action of a private self-regulatory body also demands antitrust scrutiny because of the lack of accountability inherent in the private rule-making process:

> While governmental regulators may sometimes be criticized as unaccountable to the body politic, their unaccountability pales next to that of private self-regulators. Private self-regulators are accountable to no one but themselves.

Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19:2 U. Dayton L. Rev. 471, 480 (1994).

The unaccountability of the private rulemaking process is manifest in the facts of this case. The evidence established (and the jury found) that the ostensible justifications for the rule were simply not supported by objective evidence, and that less restrictive means than a total ban could have accomplished any valid objectives the USTA might have had. Thus, the upshot of precluding the petitioner from pursuing the "conspiracy in the rule-making process" theory is to permit the USTA to escape accountability for creating a rule that forced a popular innovative product from the market, thus depriving consumers of desired product, and forcing a strong competitor from a highly-concentrated and demand inelastic market.

This Court should thus accept review of this case as it presents important issues of whether and when "conspiracy" is inherent in the rule-making process of a private sports sanctioning organization.

III. This Case Presents Important Questions Concerning The Limits Of A Private Sports-Sanctioning Organization's Ability To Design An Equipment Standard That Has The Purpose And Effect Of Banning A Popular Product Entirely From Use In That Sport.

Traditional analysis of the reasonableness of antitrust restraints poses four questions: (1) what is the specific restraint in question; (2) what are its likely anticompetitive effects; (3) are there offsetting procompetitive justifications; and (4) do the parties have sufficient market power to make a difference? *California Dental Association*, 119 S.Ct. at 1618 (Breyer, J., concurring in part and dissenting in part).

Here, the restraint in question is an equipment rule created by a private sports sanctioning organization that had the purpose and effect of banning a popular product entirely from that sport nationwide. It is significant that the market for the manufacture and sale of sulkies is highly concentrated in terms of numbers of manufacturers, as well as demand inelastic -- sulky sales marketwide totalling some 4,300 per year. It is also significant that the excluded product was a recent arrival in that market, had gained popularity due to its superior qualities, and that the company that introduced that product had rapidly acquired significant market share.

The question then becomes whether a rule that forecloses such a product from the market, depriving

consumers of a desired product, and destroying a strong competitor in its wake, is likely to have anticompetitive effects. The answer is inevitably yes. This Court has traditionally held that "market foreclosure... is facially anticompetitive and exactly the harm the antitrust laws aim to prevent." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 478 (1992). Moreover, as one commentator has noted, "[t]he promulgation and implementation of variety simplification standards... can... have serious anticompetitive effects" as they reduce consumer choice and "prevent[] innovative or superior products from being brought to the market." Harry S. Gerla, *supra*, at 485. Indeed, "[t]he more unusual the characteristics, the more problematic the standard, because elimination of those characteristics lessens rivalry among competitors and deprives consumers of desirable options." *Id.*, at 506-507. This is especially true if the product in question featured a variation that had become a "selling point" to consumers. "If the variation has become a selling point, its elimination is more likely to be anticompetitive" because "[v]ariations that become selling points put tremendous pressures on rivals to improve their products and lower costs to consumers." *Id.*

Where, as here, the plaintiff shows that the challenged restraint "on its face constitutes a restraint upon the operation of a free market... [which] operate[s] to raise prices and reduce output," thereafter, "[u]nder the Rule of Reason... [defendant] [has] a heavy burden of establishing an

affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA v. Bd. of Regents, supra*, 104 S.Ct. at 2966.

In the instant case, the jury returned a verdict for the petitioner; and the courts below limited their negation of that verdict to a finding that petitioner's evidence failed to prove "conspiracy." Yet, underlying the courts' analyses below (with their focus on the USTA's motivation and alleged independent business reasons for doing what it did) is the suggestion that the rule itself was a "reasonable" exercise of a private sports sanctioning body's authority to make rules governing the competitive conduct of its members in that sport. Petitioner submits, however, that a proper antitrust analysis belies that conclusion, and supports the jury's verdict that the product ban here was an unreasonable restraint of trade.

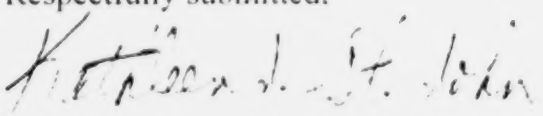
Thus, should this Court accept review of this case, and reverse the findings below with respect to conspiracy, it may rest assured that the jury's verdict on the unreasonableness of the restraint was entirely supported both in theory and under the facts of this case. Alternatively, should this Court determine that the issue of the restraint's reasonableness needs to be addressed more fully in its review of the decision below, then this case provides a compelling factual matrix for examining the limits of a private sports sanctioning organization's ability to design an equipment rule that has the purpose and effect of entirely banning a popular product from

use in that sport.

CONCLUSION

Accordingly, the petitioner, Super Sulky, Inc., respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,



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July 1999

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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OPINION

6th Circuit Case No. 97-4291
Filed April 6, 1999

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
ELECTRONIC CITATION: 1999 FED App. 0127P (6th Cir.)
File Name: 99a0127p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPER SULKY, INC.,	)	
Plaintiff-Appellant,	)	
v.	)	**Nº. 97-4291**
UNITED STATES TROTTING	)	
ASSOCIATION,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 93-01814—David D. Dowd, Jr., District Judge.

Argued: January 28, 1999
Decided and Filed: April 6, 1999

Before: **MARTIN**, Chief Judge;
RYAN and **GILMAN**, Circuit Judges.

COUNSEL

ARGUED: Kathleen J. St. John, NURENBERG, PLEVIN, HELLER & McCARTHY COMPANY, LPA, Cleveland, Ohio, for Appellant. John J. Chester, CHESTER, WILLCOX & SAXBE, Columbus, Ohio, for Appellee. **ON BRIEF:** Kathleen J. St. John, William S. Jacobson, John A. Huettner, NURENBERG, PLEVIN, HELLER & McCARTHY COMPANY, LPA, Cleveland, Ohio, for Appellant. John J. Chester, Richard A. Frye, Karen H. Hockstad, CHESTER, WILLCOX & SAXBE, Columbus, Ohio, James E. Meeks, OHIO STATE UNIVERSITY COLLEGE OF LAW, Columbus, Ohio, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. The United States Trotting Association ("USTA") is a non-profit Ohio corporation that establishes rules for harness racing, registers horses, and licenses owners and drivers. In 1993, the USTA adopted rules to standardize the design of the "sulky," a lightweight two-wheeled buggy that the horse pulls in harness racing. By doing so, it induced various state racing commissions to ban a novel form of sulky known as the Cheetah, created by the Super Sulky Corporation. This drove Super Sulky out of business. In response, Super Sulky brought suit against the USTA and numerous other defendants under §§ 1 and 2 of the Sherman Act, Ohio antitrust law, and Ohio law prohibiting tortious interference with business relationships and with contractual rights.

The claims against all defendants other than the USTA were dismissed for want of personal jurisdiction. After partial summary judgment was granted in favor of the USTA on the Sherman Act § 2 monopolization claim, the case proceeded to trial on the remaining counts. The jury awarded Super Sulky $650,000 in damages, which was trebled under the Sherman Act to $1,950,000. Shortly thereafter, the USTA moved for judgment as a matter of law, or alternatively, for a new trial. The district court granted both parts of the USTA's motion. Super Sulky now appeals. It also requests that three questions of Ohio law be resolved by certification of the issues to the Ohio Supreme Court.

For the reasons set forth below, the district court's grant of judgment to the USTA as a matter of law is **AFFIRMED,** and Super Sulky's motion to certify questions to the Ohio Supreme Court is **DENIED**.

I. BACKGROUND

Super Sulky was founded in 1992 for the purpose of manufacturing the "Cheetah Super Sulky." The Cheetah represented a break from traditional sulky design in that the shafts connecting the buggy to the horse had an hourglass shape instead of the traditional straight shafts. Super Sulky claimed that this created a narrower and more aerodynamic form, leading to faster times on the track. The perceived speed advantage resulted in large sales for Super Sulky and spawned a number of imitations known as "cheetah-style bikes."

The Cheetah, however, was not universally popular. Some drivers felt that the Cheetah reduced visibility and was less stable. Others in the harness-racing community disliked Cheetahs because they felt that the multiplicity of sulkies, of which the Cheetah was only one, was confusing to bettors at the track and led to reduced profits for everyone. Still others disliked the Cheetah because they felt that the increased speed that the Cheetah allowed led to more wear on the horses. Finally, some of the owners disliked having to spend increasing amounts on sulkies just to stay competitive.

In February of 1993, the issue of sulky standardization was first broached at a meeting of the USTA. Members of a panel discussing the issue at that meeting told the USTA's Board of Directors that cheetah-style bikes were unsafe and confusing

to bettors. The panel included representatives of the Illinois Harness Horseman's Association, an organization that had recommended the banning of all cheetah-style bikes in Illinois, and representatives of Jerald, the leading maker of the traditional-style sulky. This panel informally recommended that the sulky be standardized based on the measurements of the traditional--style sulky. The Board formed a committee to study the issue.

This committee, known as the Industry Wide Sulky Committee ("IWSC"), was made up of drivers, representatives of state-level harness-racing associations, and others involved in the racing community. No representatives of the sulky manufacturers, however, were members of the IWSC. The IWSC met five times and solicited a variety of perspectives on the issue. At one meeting, sulky manufacturers were invited to make presentations to the IWSC. Super Sulky was among the manufacturers that did so.

The IWSC also sent out a questionnaire to all active sulky drivers. This survey revealed that, among other things, the majority of active drivers felt that cheetah-style sulkies were unsafe, limited the driver's view, and had stability problems. An overwhelming majority (78%) said that sulkies should be standardized, and that the conventional-style sulky should be the standard.

In August of 1993, the IWSC recommended that the USTA adopt a series of standards applicable to sulkies, one of which would have the effect of banning cheetah-style sulkies. The other recommendations included testing all sulky styles and models, inspecting sulkies periodically, retiring sulkies after eight

years, and each manufacturer carrying at least $1 million in liability insurance. Following the IWSC's announcement, Super Sulky's sales began dropping off. Shortly thereafter, it ceased manufacturing sulkies altogether.

In March of 1994, the USTA formally adopted the sulky standardization rules. These rules technically apply only to races at which there is no "pari-mutuel" betting, but the USTA's standards are highly influential. Within two years, all state racing commissions had adopted similar standardization rules.

Super Sulky filed suit in the interim between the recommendation by the IWSC and the USTA's formal adoption of the sulky standardization rules. The USTA, several other sulky manufacturers, and a number of individual members of the USTA were named as defendants. Super Sulky alleged that (1) the USTA had conspired with sulky manufacturers to restrain trade in violation of § 1 of the Sherman Act, (2) the USTA held an illegal monopoly in violation of § 2 of the Sherman Act, (3) the USTA had violated Ohio antitrust laws, and (4) the USTA had violated the Ohio prohibitions against tortious interference with business relationships and with contractual rights.

All defendants except the USTA were dismissed for lack of personal jurisdiction. The USTA was then granted summary judgment as to Super Sulky's claims under § 2 of the Sherman Act, but the case proceeded to trial on the other claims. Super Sulky's complaint did not explicitly allege that the USTA's conduct, in and of itself, was "concerted action" violative of § 1 of the Sherman Act. Instead, it alleged that the USTA conspired with others to harm Super Sulky's business. In its

response to the USTA's motion for summary judgment, however, Super Sulky argued for the first time that an intra-corporate liability theory was implicit in its pleading. The district court ruled otherwise, holding that it was "too late, three years into the case and far beyond the close of discovery, to attempt to construct a new legal argument."

After extensive briefing and a two-week trial, the jury returned a verdict in favor of Super Sulky. It made the following findings in response to specific interrogatories:

> 1. The plaintiff proved that the USTA conspired with one or more sulky manufacturers with the intent of banning the plaintiff's product from use in harness racing;
>
> 2. The plaintiff proved that the USTA's participation in the conspiracy and adoption of the sulky standard had a substantial effect on trade and commerce in the market for the purchase and sale of sulkies in the United States;
>
> 3 Given the first two findings, the USTA failed to prove that its adoption of the sulky standard was justified as a legitimate form of industry self-regulation;
>
> 4. The plaintiff proved that the USTA's unreasonable restraint of trade was a proximate cause of damages to the plaintiff's business;

5. The plaintiff proved that, given the finding of conspiracy, the USTA's conduct

constituted tortious interference with the plaintiff's business relations;

6. The plaintiff proved that the tortious interference found in (5) proximately caused damages to the plaintiff's business;

7. The plaintiff proved that, given the finding of conspiracy, the USTA's conduct constituted tortious interference with the plaintiff's potential business relations; and

8. The plaintiff proved that the tortious interference found in (7) proximately caused damages to the plaintiff's business.

The jury awarded Super Sulky $650,000 in damages, which was tripled to $1,950,000 under the Sherman Act. *See* 15 U.S.C.§ 15. Shortly thereafter, the USTA filed a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or, in the alternative, for a new trial pursuant to Rule 59. The district court granted both parts of the motion, concluding that no reasonable jury could find that the evidence presented at trial supported a finding of conspiracy between the USTA and sulky manufacturers. In addition, the district court held that, because the state law claims were predicated upon a finding of conspiracy, judgment as a matter of law was required as to the state claims as well.

Super Sulky filed a timely notice of appeal, and, by separate motion, requests us to certify to the Ohio Supreme Court the following questions of law:

> 1. Whether specific intent is an element of a claim for tortious interference with business relations;
>
> 2. Whether Ohio law follows the analysis set forth in the Restatement (Second) of Torts § 767, in determining whether the defendant's interference with the plaintiff's business relations is improper; and
>
> 3. Whether "conspiracy" is an element of claims for tortious interference with business relations.

II. ANALYSIS

A. Judgment as a matter of law on the Sherman Act claims

1. Standard of review

In reviewing a district court's decision to grant judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure, the standard of review for issues arising under federal question jurisdiction is identical to that used by the district court. *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996). "The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury." *Id.* at 175-76. Instead, we must "view the evidence 'in the light most

favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.'" *Riverview Invs., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 482 (6th Cir. 1990) (quoting *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978)). On the other hand, the district court should be affirmed if reasonable minds could not come to a conclusion other than the one that the court reached. *See K & T Enters.*, 97 F.3d at 176.

2. Sherman Act § 1

In granting judgment as a matter of law to the USTA, the district court held that "a reasonable jury could not have found the predicate upon which this case, as pleaded by the plaintiff, must rest, i.e., that the USTA conspired with one or more sulky manufacturers to restrain trade." The district court held that *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that a jury may not infer a §1 Sherman Act conspiracy from evidence that is as consistent with independent action as with conspiracy), and *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990) (same), are controlling because the evidence of conspiracy in the present case was "ambiguous." Super Sulky disagrees, arguing that there is unambiguous evidence of conspiracy in this case, making the proper standard that found in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (holding that joint, collaborative action by automobile dealers, their associations, and General Motors to deprive franchised dealers of the freedom to deal through discounters was an unlawful conspiracy in restraint of trade).

Matsushita defined ambiguous evidence as that which is "as consistent with permissible competition as with illegal conspiracy . . . ." *Matsushita*, 475 U.S. at 588. *General Motors*, on the other hand, held that conduct is actionable when the allegedly illegal actions are "joint and collaborative . . . [and] pervasive in the initiation, execution, and fulfillment of the plan." *General Motors*, 384 U.S. at 143.

We agree with the district court that no reasonable jury could conclude that the evidence in this case unambiguously supports the existence of a conspiracy. The same conclusion was reached by this court in *Riverview* under factual circumstances precisely parallel to those under review. In *Riverview*, a real estate developer brought an antitrust suit against a community improvement corporation that had refused to issue the industrial revenue bonds required for the development project. Without the bonds, the project failed. The developer alleged that the action of the corporation's board was a conspiracy to restrain trade, motivated by the individual interests of certain board members. After a jury verdict for the developer, the district court granted judgment as a matter of law in favor of the board, finding that the developer had failed to prove a conspiracy. This court affirmed, holding that each of the members who had voted against issuing the bonds had an independent reason to want the project stopped, without any agreement among the board members. *See Riverview*, 899 F.2d at 484. In other words, the parties in *Riverview* might well have shared a common objective, but that alone did not mean that their conduct should be evaluated by the same standard that applies to a case where there is unambiguous evidence of conspiracy.

Riverview ends with the following passage, quoted by the district court in the present case, that effectively forecloses Super Sulky's antitrust arguments on appeal:

> Appellants claim that there was no evidence of independent action, that there was evidence of parallelism, that appellees had the opportunity to conspire, and that appellees' actions were consistent with a conspiracy to block competition. These arguments, however, misconstrue appellants' burden in proving the existence of a conspiracy under section 1. None of these arguments, even if accepted as true, tend to exclude the possibility of independent action. All may be *consistent* with conspiratorial conduct but, as noted throughout this opinion, proving that conduct is consistent with a conspiracy is not sufficient to allow an inference of conspiracy absent some evidence which tends to exclude the possibility that conduct is independent.

Id. at 485 (emphasis in original).

The same may be said about the present case. Super Sulky's conspiracy claim is based upon circumstantial evidence, coincidence, and speculation. The following six evidentiary points are proffered in support of its conspiracy allegations: (1) the panel discussion at the USTA annual meeting, where a Jerald executive was the only manufacturer's representative present, (2) the subsequent creation of the IWSC, (3) the allegedly "stacked" nature of the IWSC, (4) a meeting between a single IWSC

member and two Jerald executives on the same day that the first draft of the proposed specifications was discussed, (5) the personal friendships between Jerald executives and IWSC members, and (6) the fact that the IWSC's recommended sulky specifications were similar to the measurements of a Jerald sulky.

These points may be consistent with conspiratorial conduct, but Super Sulky has the burden of showing that the evidence is more consistent with conspiracy than with independent action. *See Riverview*, 899 F.2d at 483. Furthermore, when the evidence is ambiguous, as it is here, the second step in the *Matsushita/Riverview* analysis requires us to determine if there is "any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." *Id* (internal quotation marks omitted). Upon review, we find that the six items listed above do not, individually or collectively, meet Super Sulky's burden:

i. Jerald's participation on the panel

The fact that a representative of the largest and best known sulky manufacturer would participate in a panel discussion of sulkies is entirely logical and by itself raises no inference of conspiracy.

ii. Creation of the IWSC

The issue of sulky standardization was one of great importance to the harness-racing community. That a committee was created to examine the issue does not suggest a conspiracy.

iii. The "stacked" nature of the IWSC

Super Sulky presented evidence that members of the

IWSC had preconceived notions that cheetah-style sulkies were bad for harness racing. But it is altogether natural for members of the IWSC to feel strongly about the issue. The IWSC was not convened as a jury, but instead as a committee of knowledgeable people committed to the best interests of the sport. Had the panel been made up of other manufacturers, we would have a different situation. The fact that certain members of the panel disliked cheetah-style sulkies, however, does not tend to exclude independent action.

iv. The meeting between Jerald and a committee member

Super Sulky makes much of a meeting between two Jerald executives and a single IWSC member, noting that it was held on the same day that the IWSC produced its draft measurements for the new "standardized" sulky. The purpose of this meeting is hotly contested. Granting all inferences in favor of Super Sulky, however, we must assume that the purpose of this meeting was in some way improper. But the fact that one member of the IWSC met with a manufacturer does not exclude a non-conspiratorial explanation for the IWSC's action, let alone the action of the 60-member Board of the USTA.

v. Personal friendships

Personal friendships are natural in a discrete community like the harness-racing world. They do not amount to proof of conspiracy.

vi. The selection of the traditional design as the standard

The IWSC was going to recommend standardizing the sulky along the lines of one of the established models. That

Super Sulky lost does not exclude non-conspiratorial explanations, especially when the vast majority of the drivers indicated in a survey that they wanted the conventional-style sulky to be the standard.

After thoroughly reviewing the voluminous record in this case, we conclude that the evidence relied upon by Super Sulky to prove a conspiracy is as consistent with independent action as with a conspiracy. The likelihood of a conspiracy is further diminished by the fact that Jerald wrote at least one very angry letter to the IWSC pleading for quicker action, and participated in the formation of a "Sulky Manufacturing Association" that was being organized in opposition to the IWSC's actions. In sum, because Super Sulky failed to provide any evidence tending to exclude the possibility that the alleged conspiratorial conduct was in fact the result of independent action, the jury was not entitled to infer the existence of a conspiracy. The district court's grant of judgment as a matter of law to the USTA on all claims under the Sherman Act is therefore affirmed.

B. Decision not to allow an alternate theory

Super Sulky complains that the district court erred when it ruled that Super Sulky could not pursue a theory of recovery at trial that was not raised until Super Sulky's response to the USTA's motion for summary judgment. Super Sulky argues that the claim was implicit in its pleadings, and that this court has in the past held that the refusal to allow such claims to go to trial is reversible error.

1. Standard of review

We review the district court's decision to prohibit a party from amending its pleadings for abuse of discretion. *See Estes v. Kentucky Utils. Co.*, 636 F.2d 1131, 1133 (6th Cir. 1980). Although Super Sulky never formally moved to amend, Rule 15 of the Federal Rules of Civil Procedure sets forth no specific requirements for accomplishing that procedure. This court in the past has treated legal theories first raised in the plaintiff's response to a motion for summary judgment as an implicit motion to amend the complaint when all of the relevant facts had previously been pled. *See Tefft v. Seward*, 689 F.2d 637, 639-40 (6th Cir. 1982) (finding that the district court abused its

discretion in holding the plaintiff to an assault and battery charge and not considering a § 1983 claim based on identical facts).

We will find an abuse of discretion only when there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Taylor v. United States Parole Comm'n*, 734 F.2d 1152, 1155 (6th Cir. 1984) (internal quotation marks omitted).

2. There was no abuse of discretion

An examination of the complaint makes clear that Super Sulky did not allege a theory of "conspiracy within the membership of the USTA" as part of its initial pleading. The complaint consistently refers to a conspiracy between the "defendants" (some sixteen individuals and corporations) and "others listed in paragraph 20" (fifteen individuals who allegedly participated in the conspiracy). A far-reaching conspiracy against

Super Sulky is alleged, of which the USTA was only a single player. There is no mention of a conspiracy within the USTA itself. As the district court succinctly stated, "the complaint fails to reveal any hint of such a claim."

Super Sulky contends, however, that the district court abused its discretion when it did not permit Super Sulky to pursue this cause of action. Relying on this court's decision in *Tefft*, 689 F.2d at 640, Super Sulky argues that even though it had not pled this theory of recovery, it should be allowed to pursue it because "the purpose of pleading is to facilitate a proper decision on the merits," not "a game of skill in which one misstep by counsel may be decisive to the outcome." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

But Super Sulky correctly states only half of the applicable legal standard. It is true that there are circumstances in which refusing to allow an amendment to the pleadings will constitute an abuse of discretion. *See Tefft*, 689 F.2d at 640. *Tefft* makes clear, however, that the facts of the case must show that "the amended cause of action is not so different as to cause prejudice to the defendants . . . ." *Id.* at 639. This is the other half of the applicable legal standard.

The dispositive question, therefore, is whether the district court abused its discretion in finding that the delay was prejudicial to the USTA. In *Tefft*, the court found no prejudice because it was "obvious that the facts as set forth" would support the new claim. *Id.* Here, however, the district court found that the USTA would be prejudiced because "a 'concerted action' claim is too large a matter to inject into the case at this point."

The point in time to which the district court referred was "three years into the case and far beyond the close of discovery . . . ."

Super Sulky responds to the district court's finding of prejudice with the conclusory statement that "no new material inquiries of fact would be raised." But a concerted action claim in this case would focus on the conduct of the USTA itself, not on its interactions with other parties. The USTA would no longer be viewed as a single entity. Instead, the motives, actions, and conversations of individual members would take on greater significance, requiring new discovery.

Moreover, the case law in this area is unsettled. The Seventh Circuit, for example, has indicated that the notion of concerted action liability in the field of professional sports is at best confusing. *See Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (holding that for antitrust purposes the N.B.A. is sufficiently integrated to be evaluated as a single entity). Given the radical change in direction contemplated by Super Sulky's concerted action claim, we are not left with the "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Taylor*, 734 F.2d at 1155. We therefore affirm the district court's decision prohibiting Super Sulky from belatedly pursuing such a claim.

C. State law claims

Ohio law recognizes causes of action for both tortious interference with a business relationship and tortious interference

with contract rights. *See A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995). They differ only in that the former tort does not require proof of a contractual relationship. *See id.* "The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *Id.*

The district court granted the USTA judgment as a matter of law on Super Sulky's state law claims of tortious interference. This ruling was based in large part on the district court's legal conclusion that Super Sulky had failed to prove that the USTA had the "specific intent" to harm Super Sulky. On appeal, Super Sulky claims that the district court's reason for granting judgment as a matter of law was erroneous.

1. Standard of review

A federal court exercising supplemental jurisdiction over state law claims is bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction. *See Menuskin v. Williams*, 145 F.3d 755, 761 (6th Cir. 1998). "In federal court diversity cases, this circuit adheres to the minority rule that state law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict." *J.C. Wyckoff & Assoc., Inc., v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1483 (6th Cir. 1991). We therefore review the district court's grant of judgment as a matter of law using the same standards as would a state court in Ohio.

The Ohio Supreme Court has stated that a trial court's grant of a motion for judgment notwithstanding the verdict is reviewed *de novo*:

> The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions.

Gladon v. Greater Cleveland Reg'l Transit Auth., 662 N.E.2d 287, 294 (Ohio 1996) (internal quotation marks omitted). We note that this standard is not substantially different from that used under Rule 50(b) of the Federal Rules of Civil Procedure.

2. Privileged conduct

One of the key elements in a tortious interference claim is the question of whether a defendant's actions were privileged. *See A & B-Abell*, 651 N.E.2d at 1294. Ohio law imposes the burden of proving "lack of privilege" or "improper interference" on the plaintiff. *See Kenty v. Transamerica Premium Ins. Co.*,

650 N.E.2d 863, 866 (Ohio 1995) (formally recognizing tortious interference with a contractual relationship as actionable).

In interpreting Ohio law, this court has applied the definition of "improper interference" contained in § 767 of the Restatement (Second) of Torts. *See Kand Medical v. Freund Medical Products*, 963 F.2d 125, 128 (6th Cir. 1992) (holding that under § 767, the conduct of a medical-devices distributor was privileged under Ohio law because the conduct constituted lawful attempts to expand the defendant's business).

Kand sets forth the following seven factors to be considered in deciding whether the alleged conduct was privileged, all of which are drawn from § 767:

> (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the party with whom the actor has interfered, (4) the interests sought to be advanced by the actor, (5) the social interests of protecting the freedom of contracting and the interference with such, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.

Kand, 963 F.2d at 128. The nature of the actor's conduct is the chief factor that the court should consider. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt c (1977).

In its post-verdict decision, the district court extensively discussed most of the above factors, albeit under the rubric of "specific intent" and without referring to § 767 as such. The

district court's decision states, in essence, that because the USTA lacked the specific intent to harm Super Sulky, that the latter had not met its burden of proving a lack of privilege. In other words, because the "nature of the actor's conduct" (the first factor under § 767) showed no evidence of intent to harm Super Sulky, USTA's conduct was privileged. We agree.

The record reveals that the issue of sulky standardization was a controversial one in the industry. Comments to the USTA's Board indicated numerous reasons why members of the harness-racing community disliked cheetah-style sulkies. These included confusion among race fans, safety, cost, and the adverse effects that the new sulkies were having on the horses. The record is devoid of evidence upon which a reasonable jury could conclude that the USTA had any improper motive in banning cheetah-style sulkies. There was a clear sentiment in favor of standardization. The USTA was in a situation where someone's ox was going to be gored no matter what standard it adopted. By necessity, the sales of non-conforming sulkies would be "interfered with" as a consequence of standardization. Perhaps the best proof of this fact is that virtually every sulky maker was equally apprehensive about the standardization process. Even Jerald, the industry leader and Super Sulky's chief competitor, was part of a group planning a "Sulky Manufacturing Association" to oppose the actions of the USTA. The record plainly shows that the USTA made a good-faith determination that the conventional-style sulky was best for the sport. As a result, the conduct of the USTA, the "chief factor" that courts should consider, strongly supports the USTA's privilege defense. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1977).

So too with the second factor, the USTA's motive. Not even Super Sulky alleges that the USTA's motive was to interfere with Super Sulky's business relationships (although it does allege as much with regard to Jerald).

The third factor, the interests of the party with whom the actor has interfered, is the only one that weighs in favor of Super Sulky. Super Sulky went from an industry leader to a defunct business within a matter of months.

The fourth factor, however, the interest sought to be advanced by the actor, clearly offsets the harm done to Super Sulky. As discussed above, the USTA sought to regulate harness racing for the benefit of the industry as a whole. All regulations, by definition, "interfere" with business relationships in the sense that by specifying what is acceptable, they make sales of that which is deemed unacceptable less likely. Such is the inevitable consequence of setting standards. The USTA's mission is to work for the good of the harness-racing industry as a whole. That mission would be rendered impossible if all promulgated regulations left it open to tortious interference claims.

The fifth factor, the social importance of contracts, is beyond dispute. As stated above, however, the USTA had no motive to harm Super Sulky. Instead, it was acting for the good of the harness-racing industry, an action that does not undermine the importance of contracts.

The sixth factor looks to the proximity of the conduct in causing the harm. Here it was the actions of the various state

racing commissions that were directly responsible for Super Sulky's harm, because they are the ones that make the final choices as to what type of sulkies are to be used at each track. Although the USTA's actions are highly influential, its decisions in the present case were ultimately only recommendations to the state racing commissions.

The seventh and final factor to be considered is the relationship between the parties. Here the relationship was clearly at arm's length, as opposed to fiduciary in nature. There is also no evidence of fraud, misrepresentation, coercion, or threats, such being the type of conduct found objectionable in other cases. *See, e.g., Kand Med.*, 963 F.2d at 129.

In short, the USTA's conduct was the sort that all reasonable minds would find to be privileged. While it would have been preferable for the district court to focus on privilege rather than on "specific intent," and to explicitly lay out the balancing test set forth in Restatement § 767, it nonetheless reached the correct result when it found in favor of the USTA on this issue.

3. Specific v. general intent

Super Sulky also claims that the district court erred in holding that specific intent to harm is an element of a tortious interference claim under Ohio law. As explained above, we do not read the district court's opinion to state that specific intent is always an element of tortious interference claims under Ohio law. Rather, we believe that the district court's focus on the USTA's lack of specific intent to harm Super Sulky was simply an

alternate way of saying that the nature of the USTA's conduct and its motivations made its actions privileged as a matter of law.

We therefore find it unnecessary to further discuss this issue.

D. Certification

Finally, Super Sulky has asked this court to certify to the Ohio Supreme Court the questions of law set forth in Part I above.

1. Standards for certification

Rule XVIII of the Ohio Supreme Court Rules of Practice gives the Ohio Supreme Court discretion to answer questions of law certified to it by this court. To invoke the rule, we must decide that "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent" of the Ohio Supreme Court. OHIO SUP. CT. R. OF PRAC. XVIII, § 1; *see Scott v. Bank One Trust Co.*, 577 N.E.2d 1077 (Ohio 1991) (holding that the Ohio Supreme Court has the power under the Ohio Constitution to answer questions certified to it by a federal court).

2. Proposed Question 1

The first question that Super Sulky seeks to have certified relates to the requisite showing of intent for tortious interference claims under Ohio law. As discussed above, the question of intent, although unresolved under Ohio law, is not determinative in this proceeding because there is no need for this court to reach it. The district court's ruling on the lack of "improper

interference" was sufficient, by itself, to grant judgment for the USTA as a matter of law. We therefore decline to certify Question 1.

3. Proposed Question 2

Question 2 asks the Ohio Supreme Court to determine whether § 767 of the Restatement (Second) of Torts is the proper analysis for determining whether there was "improper interference" in a tortious interference claim. Unless and until the Ohio Supreme Court rules to the contrary, this is not an open question in this circuit. This court has previously applied § 767 as the prevailing Ohio law. *See Kand Med., Inc., v. Freund Med. Prod., Inc.*, 963 F.2d 125, 128 (6th Cir. 1992). The district court's analysis of this issue, although it did not cite *Kand Medical*, was not contrary to § 767. There is thus no need to certify Question 2.

4. Proposed Question 3

Question 3 seeks to certify the issue of whether "conspiracy" is an element of a tortious interference claim under Ohio law. This appears to be another issue that has not been resolved by the Ohio Supreme Court. As with Super Sulky's other proposed questions, however, it would not be determinative of this appeal. Even assuming that the district court improperly required Super Sulky to prove conspiracy, we have concluded that the USTA's actions were privileged. That is sufficient, by itself, to affirm the district court's grant of judgment for the USTA as a matter of law. We therefore decline to certify Question 3 to the Ohio Supreme Court.

III. CONCLUSION

For all of the reasons set forth above, the district court's grant of judgment to the USTA as a matter of law is **AFFIRMED**, and Super Sulky's motion to certify questions of ?law to the Ohio Supreme Court is **DENIED.**

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM OPINION
(Resolving Docket No. 200)

U.S. District Court Case No. 1:93-CV-1814
Filed September 26, 1997

Pages B-1 thru B-41

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Super Sulky, Inc., dba Cheetah Super Sulky, Inc.,	)
	)Case No. 1:93-CV-
Plaintiff,	)1814
	)
vs.	)MEMORANDUM
	)OPINION (Resolving
United States Trotting Association,	)Docket No. 200)
	)
Defendant.	)

I. INTRODUCTION

This case involves claims of antitrust and tortious business interference against the United States Trotting Association ("USTA"), a nonprofit corporation with its headquarters in Columbus, Ohio. The plaintiff, Super Sulky Inc., developed a sulky for use in harness racing in the early 1990s.[1] The plaintiff's sulky, the "Cheetah Super Sulky," was

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[1] A sulky, also referred to as a bike, is a lightweight, two-

designed with different measurements than traditional sulkies. In particular, the shafts were bent inward to create a sulky which was narrower than, and arguably aerodynamically improved over, a traditional sulky.

Although the plaintiff was not the only manufacturer marketing a bent-shaft sulky, it was having success in the marketplace, with sales steadily improving in 1992 and early 1993. Horses using the Cheetah set some track records. However, the new type of sulky was not universally popular among drivers, owners and manufacturers. Although objective evidence was at best ambiguous, concerns were raised with respect to the safety of the bent-shaft sulkies, from a standpoint both of vision of the drivers during a race and strength of the materials used in manufacture of the bikes.

The USTA's February 1993 annual meeting included a panel discussion on sulkies. The USTA voted to convene an Industry-Wide Sulky Committee ("IWSC") to study issues of sulky safety and standardization and make recommendations to the USTA. The IWSC met five times in the spring and summer of 1993. At one meeting manufacturers were invited to make presentations. The plaintiff was among the manufacturers which made a presentation to the committee.

In August 1993, the IWSC voted to recommend that the USTA, at its next annual meeting, adopt a series of regulations for sulkies which, *inter alia*, would have the effect

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wheeled buggy in which the driver sits during a harness race.

of banning bent-shaft sulkies, including the Cheetah product.[2] Sales of the plaintiff's product dropped almost immediately, and the plaintiff ceased manufacturing. (Test. at 372). Seven months later, at the March 1994 annual meeting of its board of directors, the USTA voted to adopt the IWSC recommendation with respect to sulky standardization.[3] From that time, all bent-shaft sulkies, including the plaintiff's product, have been banned by USTA regulations. Although those regulations only officially apply to races not involving pari-mutual betting, state racing commissions (which govern wagered races) take their cue from USTA standards, and every state has adopted the standard banning the bent-shaft sulkies.

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[2] Standardizing the size of sulkies was only one of six recommendations by the committee. The others were: 1) requiring testing of all sulky styles, types and models; 2) mandatory periodic inspections of sulkies; 3) requiring sulkies to be retired after eight years; 4) requiring each manufacturer to carry at least $1 million in liability insurance; and 5) establishing a procedure for approving new sulkies for use in sanctioned races. (Def. Exh. HHHHH).

[3] With respect to shafts, the standard required that inside-to-inside measurements be within a range of 42 to 50 inches at the front of the arch. The plaintiff's product was as narrow as 17 inches.

This lawsuit alleges that the USTA conspired with rival manufacturers of the plaintiff in order to adopt a standard which would knock the plaintiff, an up-and-coming manufacturer, out of business. The conspiracy was alleged to violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and also constitute the state law torts of tortious interference with business relations and tortious interference with potential business relations.

The lawsuit did not allege that the USTA action, in and of itself, was "concerted action" subject to Section 1 antitrust liability without a finding of a conspiracy with outsiders.[4] However, the plaintiff attempted to inject this legal theory into the case at the summary judgment stage. The Court held it was too late, three years into the case and far beyond the close of discovery, to attempt to construct a new legal argument. See mem. op. Sept. 3, 1996 (Docket No. 89) at 25 ("The Court will not read into the complaint what the plaintiff could have asserted but did not"). Thus the Court expressly held that the case would proceed only upon the theory that the

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[4] It is recognized that "[n]on-profit voluntary associations which sanction and regulate professional sporting tournaments, races and other contests have been held subject to the antitrust laws in the exercise of their rulemaking authority." Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F.Supp. 1103, 1114 (D.Neb.), aff'd, 665 F.2d 222 (8th Cir. 1981).

USTA "conspired with sulky manufacturers." Id. at 26.

The case went to trial on July 14, 1997, on the antitrust and state business tort claims. After a two-week trial, a jury made the following findings in response to specific interrogatories:

> 1. The plaintiff proved that the USTA conspired with one or more sulky manufacturers with the intent of banning the plaintiff's product from use in harness racing;
>
> 2. The plaintiff proved that the USTA's participation in the conspiracy and adoption of the sulky standard had a substantial effect on trade and commerce in the market for the purchase and sale of sulkies in the United States;
>
> 3. Given the first two findings, the USTA failed to prove that its adoption of the sulky standard was justified as a legitimate form of industry self-regulation;
>
> 4. The plaintiff proved that USTA's unreasonable restraint of trade was a proximate cause of damages to the plaintiff's business.
>
> 5. The plaintiff proved that, given the finding of

conspiracy, the USTA's conduct constituted tortious interference with the plaintiff's business relations;

6. The plaintiff proved that the tortious interference found in (5) proximately caused damages to the plaintiff's business;

7. The plaintiff proved that, given the finding of conspiracy, the USTA's conduct constituted tortious interference with the plaintiff's potential business relations; and

8. The plaintiff proved that the tortious interference found in (7) proximately caused damages to the plaintiff's business.

The jury awarded damages in the amount of $650,000, which the Court trebled to $1,950,000 plus costs and a reasonable attorney's fee pursuant to 15 U.S.C. § 15 (judgment entry, Docket No. 188). It is from this judgment that the defendant has filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial pursuant to Rule 59 (Docket No. 200). The matter has been fully briefed. For reasons set forth below, the Court grants the motion for judgment as a matter of law and, pursuant to Rule 50(c), conditionally grants the motion for a

new trial. By separate entry, the Court shall enter judgment in favor of the defendant.

II. STANDARD OF REVIEW

A. Standard for Judgment as a Matter of Law

The Sixth Circuit has noted the deference which must be paid to a jury's verdict in considering a Rule 50 motion for judgment as a matter of law:

> The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of [the] court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted ... only if reasonable minds could not come to a conclusion other than one favoring the movant.

K&T Enterprises, Inc. v. Zurich Ins. Co., 97 F.3d 171, 175-76 (6th Cir. 1996).

B. Standard for Granting a Motion for a New Trial

Under Fed. R. Civ. P. 59, "[a] new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]"

Courts generally interpret this language to mandate a new trial "when a jury has reached a seriously erroneous result as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, the proceedings being influenced by prejudice or bias." Holmes v. City of Massillon, Ohio, 78 F.3d 1041, 1045-46 (6th Cir. 1996) (quotation omitted). Under this analysis the trial court "must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence." J.C. Wyckoff & Associates v. Standard Fire Ins. Co., 936 F.2d 1474, 1487 (6th Cir. 1991). However, a Rule 59 motion should be denied if "the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable." Id.

III. DISCUSSION

The defendant advances seven reasons justifying reversal or vacation of the jury's verdict: 1) the evidence did not prove a conspiracy; 2) the evidence did not prove an unreasonable restraint that substantially harmed competition; 3) the plaintiff failed to prove antitrust injury; 4) the evidence did not prove tortious interference with business relations; 5) damages were based on speculation; 6) newly discovered bias

of one of the plaintiff's witnesses; and 7) the jury was misled by improper argument and by deficient jury instructions.

Upon meticulous review of the record, and reviewing the evidence in the light most favorable to the plaintiff, including construing all reasonable inferences in the plaintiff's favor, the Court is convinced that a reasonable jury could not have found the predicate upon which this case, as pleaded by the plaintiff, must rest, i.e., that the USTA conspired with one or more sulky manufacturers to restrain trade. Accordingly, the Court is compelled to enter judgment notwithstanding the verdict in favor of the USTA.

Judgment notwithstanding the verdict is required both for the federal and state claims. This is because the state tortious interference with business relations claims, like the antitrust claim, were predicated upon a finding of conspiracy.

In the alternative, the Court conditionally grants the defendant's motion for a new trial on the basis that the evidence of conspiracy was against the great weight of the evidence.

In the interest of thoroughness, and for the sake of appellate review, the Court will address the remaining grounds for relief asserted by the defendant as well.

A. Did the Evidence Prove a Conspiracy?

Since its memorandum opinion of September 3, 1996 (Docket No. 89), which granted in part and denied in part the defendant's motion for summary judgment, the Court has

noted that the plaintiff's case could not succeed without a threshold showing that the USTA conspired with a manufacturer or manufacturers to restrain trade. The suspect activity of those who were neither USTA representatives nor manufacturers has no bearing upon the USTA's liability in this case unless such activity would shed light upon a conspiracy involving the USTA and one or more manufacturers. The plaintiff concedes the only manufacturer implicated in its alleged conspiracy is Jerald Sulky Company ("Jerald"). (Response brief at 3). In this difficult case, the Court's inquiry narrows to a relatively simple question: Was there evidence upon which a reasonable jury could have found that USTA representatives and Jerald personnel had an illegal agreement to act together to restrain trade? This question must be approached in light of Supreme Court and Sixth Circuit jurisprudence on the role of circumstantial evidence in detecting a Section 1 conspiracy.

The starting point in an analysis of a claim of antitrust conspiracy based upon ambiguous evidence is Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In Matsushita, several American electronic corporations brought an antitrust action against 21 Japanese counterparts, alleging that the defendants, over a 20-year period, had illegally conspired to drive the American firms out of the television set market by conspiring to maintain artificially low prices for televisions sold in the United States. The district court granted summary judgment to the

defendants, in part because the court found it unreasonable to infer a conspiracy by the defendants' actions. The Court of Appeals for the Third Circuit reversed, stating that a jury should have the opportunity to draw inferences in favor of the plaintiffs. The Supreme Court reversed the Court of Appeals, emphasizing the limits on permissible inferences in Section 1 antitrust cases:

> Respondents [plaintiffs] correctly note that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case. ... [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. ...

Id. at 587-88 (quotation and citations omitted).

Weighing heavily in the Supreme Court's Matsushita

analysis, and weighing heavily in the instant case, is the lack of an economic motive on the part of the defendant. In Matsushita the Supreme Court stressed several times that an inference of conspiracy was undercut by the "economically irrational" nature of the alleged agreement.[5] The Supreme Court stated that "if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Id. at 587. In language severely damaging to the plaintiffs in the instant case, the Court stated:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: *if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.*

Id. at 596-97 (emphasis added).

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[5] In Matsushita, a conspiracy would have required the defendants to willingly sustain financial losses over a long period of years with no guarantee of recovering those long-term losses in the future.

Applying the principles of Matsushita and another Supreme Court antitrust case, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), the Sixth Circuit affirmed the district court's grant of a motion for judgment notwithstanding the verdict in Riverview Investments Inc. v. Ottawa Community Improvement Corporation, 899 F.2d 474 (6th Cir. 1990). In Riverview, the Sixth Circuit held:

> As the District Court noted, *Monsanto* and *Matsushita* together establish
>
> > a two-part inquiry for evaluating the propriety of summary judgment in an antitrust conspiracy case: (1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.
>
> Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987). A plaintiff thus fails to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action.

Id. at 483. Riverview went so far as to say, "A fact finder may not infer a conspiracy if there is no economic motive to

conspire and there is a nonconspiratorial explanation for the alleged conspiratorial conduct." Id.[6]

The facts of Riverview are instructive here. In that case, a real estate developer brought an antitrust action against a community improvement corporation ("the CIC") following the CIC's refusal to issue industrial revenue bonds ("I.R.B.'s") for a development project. The developer alleged that the decision of the CIC members amounted to a conspiracy to restrain trade. The motive for a conspiracy, according to the plaintiff, included the CIC members' individual self-interest (some had economic ties to the downtown area) and the members' alleged commitments to existing business owners

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[6] The plaintiff hotly debates the relevance of economic motive. It argues that it is not required to show a motive. In the strict sense, that is true; economic motive is not an element of the plaintiff's case. However, in light of ambiguous evidence, the presence or absence of economic motive is highly probative to the issue of whether it is reasonable to infer a conspiracy. As the Supreme Court held in Matsushita, "[I]f the claim is one that simply makes no economic sense[,] respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita, 475 U.S. at 587. Plaintiff's protests notwithstanding, the Court cannot ignore the clear case law in Matsushita and Riverview stressing the important role economic plausibility plays when trying to make sense out of ambiguous evidence.

to protect them from competition. A jury found for the plaintiff and awarded $350,000 in damages, which was trebled to $1,050,000 pursuant to 15 U.S.C. § 15. In entering j.n.o.v., the district court found an inference of conspiracy unreasonable under Matsushita, in part because the plaintiff failed to prove the CIC members were acting collusively rather than in their own-self interests. The appeals court agreed:

> Each of the three members [voting against the I.R.B.'s] had an economic motive to deny the I.R.B.'s regardless of any agreement with other CIC members. The effect of their business interests is thus highly ambiguous -- it evidences individual motivation to deny the I.R.B.'s as much as it evidences any kind of conspiratorial conduct. Even if we were to agree that it establishes a motive to conspire, appellees' conduct is just as consistent with independent action. ... In sum, the presence of a motive to conspire based either on personal pecuniary interests of CIC members or commitments made to local businessmen to protect them from competition does not "tend to exclude the possibility of independent action[.]"

Id. at 484 (quotation omitted). Riverview closes with a quote which is quite applicable to this case:

> Appellants claim that there was no evidence of independent action, that there was evidence of

> parallelism, that appellees had the opportunity to conspire, and that appellees' actions were consistent with a conspiracy to block competition. These arguments, however, misconstrue appellants' burden in proving the existence of a conspiracy under section 1. None of these arguments, even if accepted as true, tend to exclude the possibility of independent action. All may be *consistent* with conspiratorial conduct but, as noted throughout this opinion, *proving that conduct is consistent with a conspiracy is not sufficient to allow a inference of conspiracy absent some evidence which tends to exclude the possibility that conduct is independent.*

Id. at 485 (first emphasis in original). Thus under Riverview, it is not enough to show that the defendant's conduct was "consistent with a conspiracy to block competition." Id. There must be more: the law places an affirmative burden upon the plaintiff to provide evidence which "tends to exclude the possibility that conduct is independent." Id. The affirmance of j.n.o.v. in the Riverview case, despite significant circumstantial evidence presented by the plaintiff, exhibits the substantiality of the plaintiff's burden in this regard.

In the instant case, the plaintiff's conspiracy claim is based completely upon circumstantial evidence, which is not unusual in conspiracy cases. However, not only is the

evidence circumstantial; it also is extraordinarily ambiguous. As discussed further below, all of the purported illegal ties between the USTA and Jerald can be explained plausibly absent a conspiracy.

The plaintiffs attempted to establish the conspiracy between the USTA and Jerald by linking a number of events and asking the jury to infer conspiracy. Those events included, *inter alia*: 1) a panel discussion at the USTA's annual meeting in February 1993 on the issue of bent shaft sulkies, in which Jerald's David Seitz was the only manufacturer participating; 2) the subsequent creation of an Industry-Wide Sulky Committee to examine the issue of standardizing sulkies; 3) the allegedly "stacked" nature of the IWSC in favor of banning the cheetah-style sulkies despite alleged widespread support for that style of bike; 4) a meeting between IWSC member Phil Langley and Jerald's Seitz and William Card on April 17, 1993, the same day as proposed specifications which banned the plaintiff's product were developed; 5) personal friendships between IWSC member Clint Galbraith and Jerald's Seitz and Card; 6) the fact that measurements adopted by the IWSC, and ultimately by the USTA, were similar to the measurements of the Jerald product.

To quote Riverview, "None of these arguments, even if accepted as true, tend to exclude the possibility of independent action. All may be *consistent* with conspiratorial conduct but, as noted throughout this opinion, proving that

conduct is consistent with a conspiracy is not sufficient to allow an inference of conspiracy absent some evidence which tends to exclude the possibility that conduct is independent." Riverview, 899 F.2d at 485 (emphasis in original).

Not only has the plaintiff failed to provide evidence tending to exclude the possibility of independent conduct; the defendant has provided affirmative evidence (although it has no burden to do so) to support a finding of independent conduct on the part of both the USTA and Jerald.

Clearly Jerald did not act the part of a conspirator. Its president, William Card, corresponded with the USTA in writing several times throughout the process of adopting standards. See Def. Exhs. AAAA-1, NNNN-1, and AAAAA-1.[1] Although Card agreed standards should be set, he consistently lobbied for more input from manufacturers in deciding what the standards should be. In his letter of June 14, 1993, to the USTA's Kent Hastings, Card stated that "we agree ... that standards must be set to regulate the design and safety of racing sulkies," but added that "in our opinion some [proposed standards] are not feasible by the date of January 1, 1994." (Def. Exh. AAAA-1). Card wrote to USTA executive vice president Fred J. Noe on September 28, 1993, a time in which the new standards had been proposed by the IWSC but

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[1] Contrary to the plaintiff's assertion in its post-trial brief, the first of these letters was written prior to the filing of this lawsuit.

not adopted by the USTA, pleading for quicker action from the USTA:

> [T]his announcement [that the standards would not be considered for approval by the USTA until March 1994] has created havoc, not only for our company, but for all sulky manufacturing companies, for all of the dealers in the U.S. and Canada that sell sulkies, and also the trainers and owners that need or want to purchase a new sulky.
>
> Business is at a standstill. Orders have been canceled. Daily we receive calls from people asking for advice, guidance, and guarantees. We honestly do not know what to tell these people.
>
> We think the [IWSC] recommendations should be presented to the USTA Board of Directors as soon as possible and not wait until March of 1994.

(Exh. NNNN-1). Despite Card's letter, the USTA deferred action until its March meeting.

This hardly sounds like correspondence between co-conspirators. In fact, Card testified that one point he got so "mad at USTA" that he signed a paper along with other manufacturers purportedly announcing the formation of a "Sulky Manufacturing Association" to promote integrity in sales and manufacturing of sulkies. (Test. at 1527; Def. Exh.

1111-21.[8] Card testified the manufacturers planned to form the association because, at the time, the USTA was rejecting the manufacturers' proposed standards.

Moreover, despite the plaintiff's insinuations, it is not at all clear that standardization was an economic boon to Jerald. The evidence indicated Jerald's version of the cheetah-style sulky, the Jet, was its biggest seller in 1993, amassing 582 of its 1,342 overall sales. Card testified he had a larger profit margin on the Jet than on his traditional sulkies because he could use less expensive stainless steel rather than wood for the Jet. (Test. at 1481-82). The following year, in which the standards were adopted, Jerald's sale of the Jet plunged to 11, and its overall sales decreased to 1,001.[9] It is not clear Jerald's financial interests were best served by eliminating the cheetah-style sulkies.

In any event, Card offered his own reasons favoring standardization. He testified he is a 40-year veteran of the harness racing industry who believed that standardization was

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[8] Seven manufacturers, not including the plaintiff, signed the paper announcing the formation of the association, but according to Card, the group never followed up or engaged in any meetings or activities as an association.

[9] Even in 1995, Jerald sold only 1,069 bikes, still not close to its high-water mark of 1,342 sales in 1993, prior to adoption of the standard.

in the best interest of the betting public and would cause the best horse, rather than the best sulky, to win. (Test. at 1502-03). He also expressed doubt that welded steel was as safe as wood.

The plaintiff exposes the fact Card does not have an engineering background and has no engineering basis for some of his conclusions. However, the issue is not whether Card's impressions are right or wrong; the issue is whether his company conspired with the USTA. Card was not alone in the industry, as there was a segment of the community which thought, correctly or not, that metal and bent-shaft sulkies were less safe than traditional, wood, straight-shaft sulkies.

Additionally, the fact that Jerald supported specifications along the lines of the measurements of its traditional sulky is of little relevance to a conspiracy inquiry. The IWSC solicited input from each manufacturer, and it is natural that Jerald, as well as the other manufacturers, would promote its product as the prototype for USTA specifications. Any unilateral activity by Jerald in its own best interest is not a Section 1 violation.

In sum, Jerald's conduct is "consistent with other, equally plausible explanations," Matsushita, 475 U.S. at 596-97. Therefore as a matter of law "the conduct does not give rise to an inference of conspiracy." Id. at 597.

In the absence of a co-conspirator manufacturer, the USTA cannot be liable on a conspiracy claim. Thus the USTA can rely upon Jerald's rational non-conspiratorial

explanation to avoid its own liability. However, the USTA offers its own non-conspiratorial motives for adopting the specification standards. By the time of the 1993 annual meeting, there was division in the industry over bent-shaft sulkies. It was clear a substantial number of members of the industry, including horse track owners and horse trainers and drivers, favored standardization.[10] The USTA established the IWSC to research the matter and offer proposals. The IWSC allowed each manufacturer to present proposals. The plaintiff was among the manufacturers making a presentation. Ultimately the IWSC recommended specifications banning the plaintiff's product as well as all other bent-shaft products.

It is debatable whether such a standard was wise or was justified by objective safety information available at the time. There is considerable evidence the USTA's decision may not have been well thought out. However, the foundation upon which the jury's verdict stands is a finding of conspiracy between the USTA and Jerald. Whether or not the standardization was smart is irrelevant; whether or not standardization was justified from a competitive status is no

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[10] Even the plaintiff's president, Craig Stein, admitted cheetah-style sulkies were not universally popular, as some in the industry preferred the cheetah style and some did not. (Test. at 276).

more relevant unless the plaintiff proves a conspiracy.[11] Like Jerald, the USTA has offered plausible non-conspiratorial reasons for its conduct.

Moreover, the plaintiff offered no evidence of an economic motive on the part of the USTA which would induce it to engage in an unlawful conspiracy with Jerald. The combination of lack of economic motive and a nonconspiratorial rationale for the USTA's conduct leads the Court to conclude the plaintiff has not offered evidence tending to exclude the possibility of independent conduct.

In the Court's view, the closest the plaintiff comes to offering evidence of collusion between Jerald and the USTA is the April 17, 1993, meeting at a Chicago racetrack attended by a number of people, including IWSC member Phil Langley

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[11] Were this a "concerted action" case, in which the vote to adopt the rule was the subject of the conspiracy claim, the Court would be required, even in the absence of a conspiracy with a manufacturer, to engage in an analysis of the reasonableness of the standard under the Rule of Reason. See, e.g., Gunter Harz Sports, Inc. v United States Tennis Association, 511 F.Supp. 1103 (D.Neb.), aff'd, 665 F.2d 222 (8th Cir. 1981). However, as this Court has stressed repeatedly, the predicate for this case is a conspiracy between the USTA and one or more manufacturers. Absent such a conspiracy, it is improper to reach, and unnecessary to consider, the merits of the rule.

and Seitz and Card of Jerald. Langley was manager and director of racing at two Chicago racetracks which banned bent-shaft sulkies prior to the USTA ban. That day Langley produced a list of "tentative[]" sulky specifications. (Pl. Exh. 43), many of which paralleled the specifications of Jerald's traditional sulky. The plaintiff alleges this is evidence of a conspiracy between Jerald and the USTA (through IWSC member Langley) to adopt specifications which would restrain trade.

Langley offered a different explanation. As director of two tracks in Illinois, he believed in sulky standardization. In fact, his leadership contributed to the banning of bent-shaft sulkies on the two Illinois tracks prior to the establishment of the IWSC.[12] Langley testified he typed the April 17 list, with

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[12] This calls into question Langley's objectivity at the time he was selected as an IWSC member. Although this perhaps is evidence of the sloppy way the USTA proceeded on the issue, it fails to raise an inference of conspiracy for two reasons. First, the evidence indicates there were fifteen members of the IWSC. (Def. Exh. CCC-2). Appointment of one (or even three or four) members who had previously expressed an opinion about standardization does not create much of an inference of conspiracy. Second and more fundamentally, the conspiracy inquiry must be focused on a conspiracy between the USTA and Jerald. The possibly injudicious appointment of Langley has no relevance on the issue of whether the

input from Jerald and others, as a starting point for creating specifications for a proposal which he would present to manufacturers. Langley testified he was contemplating large-scale purchase of sulkies by his race tracks. He said he planned to invite bids for his tracks to purchase 50 or more sulkies to ensure standardization at those sites. (Test. at 1367). He said Jerald was invited to the meeting because it was one of two main manufacturers providing sulkies at his tracks and because it was scheduled to be at the track for another purpose on the date of the meeting. (Id. at 1368). Both Seitz and Card testified that the primary purpose of their visit to the Chicago track that day involved discussion of construction of new wheel guards on sulkies to prevent wheels locking together during a race. (Seitz trial depo. test at 18; Card test. at 1522). This is a plausible, nonconspiratorial explanation for the meeting.

In any event, in the Court's view this is the only evidence even arguably tying Jerald and the USTA into a conspiracy together. And it is very tenuous evidence; it is the mere fact that Jerald proposed its traditional specifications at a meeting called by one of the fifteen IWSC members. All manufacturers had the opportunity to make their own proposals directly to the full IWSC at a formal meeting less than a month later, on May 10, 1993. On the basis of all of the evidence, is unreasonable to bootstrap an entire

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USTA and Jerald were in the midst of an illegal agreement.

conspiracy into this case on the basis of the ambiguous April 17 meeting.

In sum, the conduct of the USTA and its alleged co-conspirator, Jerald, is consistent with other plausible explanations not amounting to a conspiracy. Any inferences arising from a tenuous connection between the USTA and Jerald do not "tend to exclude the possibility" of independent action. Matsushita, 475 U.S. at 588; Monsanto, 465 U.S. at 764; Riverview, 899 F.2d at 483. In other words, the plaintiff has not shown that "the inference of conspiracy is reasonable in light of the competing inferences of independent action." Matsushita, 475 U.S. at 587-88. This is especially true because the trial did not produce evidence of an economic motive on the part of the USTA to participate in the conspiracy as alleged by the plaintiff. For these reasons, the Court is compelled to enter judgment notwithstanding the verdict in favor of the defendant.

This conclusion leads the Court to conditionally grant the defendant's motion in the alternative for a new trial. The basis for the Court's conditional grant of a motion for a new trial is that, as outlined in the preceding discussion, the finding of a conspiracy between the USTA and a sulky manufacturer was against the great weight of the evidence.

B. The Remaining Assertions by the USTA

The Court's analysis above is dispositive of the case. However, for the purpose of appellate review the Court

engages in an analysis of the remaining six grounds for relief asserted by the USTA.

1. Does the Evidence Support a Finding of Unreasonable Restraint Substantially Harming Competition?

The USTA argues the evidence failed to show that the restraint in question, i.e., the sulky standardization rule, had an unreasonably anti-competitive effect on the market. The USTA properly notes that market effect normally is analyzed in terms of price and output of goods. However, agreements which have the effect of limiting consumer choice also can be anti-competitive. See FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986). Although the evidence did not show an increase in the price or an overall reduction in the output of sulkies, there was evidence showing the elimination of a product and the corresponding reduction in consumer choice. Thus there is no question adoption of the sulky standardization rule eliminated a popular product, cheetah-style sulkies, from the relevant market, i.e., the market for purchase and sale of sulkies in the United States.

The USTA also correctly points out that an antitrust violation requires harm to competition, not merely to a single competitor. The Court pointed out as much, quite clearly, in its jury instructions.[13] The USTA points out there was no

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[13] The relevant portion of the instruction stated at page 24 in the instructions:

evidence of a reduction of the number of competitors other than the plaintiff. However, the Court is of the view that a head count of the number of competitors in the marketplace, while relevant, is not the *sine qua non* of an antitrust claim. The evidence indicated that consumer choice was diminished significantly by the adoption of the sulky standardization rule. Such a limitation of consumer choice is anticompetitive in the absence of legal justification.

The USTA argues the jury instructions improperly placed the burden of persuasion on the defendant with respect to competitive harm. The Court disagrees. The Court could find no direct precedent to guide it in crafting instructions. This case is *sui generis*. There are numerous cases involving antitrust claims against standard-setting organizations in their rulemaking capacity, and there are numerous cases involving antitrust conspiracies, vertical and horizontal. This case is a hybrid of those two norms, i.e., alleging that a standard-

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> You must keep in mind that antitrust law is concerned with conduct that injures or destroys competition, not merely conduct which may injure or eliminate a particular business competitor. Antitrust laws were created for the benefit of the consumer, not for the benefit of any particular competitor. Evidence that the restraint harmed the plaintiff's business is not enough by itself, although it is one relevant factor.

(emphasis in original).

setting organization conspired with others and abused its rulemaking powers thereby. The Court attempted to shape antitrust principles to the unique nature of this case. It concluded that the burden was on the plaintiff to 1) prove a conspiracy and 2) prove that the conspiracy had a substantial effect on trade and commerce in the relevant market. Only if the plaintiff met these two substantial hurdles did the burden shift to the USTA to show that adoption of the rule was a legitimate form of self-regulation. This imposition of burdens is far from "placing on Defendant substantially the entire burden of proof" on anti-competitive effect, as the defendant claims (Brief at 15), and is consistent with the burden-shifting required by the Supreme Court in NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984), and National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

2. Did the Plaintiff Prove Antitrust Injury?

The defendant argues that the case is fatally flawed by the plaintiff's inability to show its damages were caused by violation of the antitrust laws. It cites several other occurrences which, it asserts, were more likely the cause of the plaintiff's downfall. These include 1) the illness and death of William Kiraly, a 50 percent shareholder of the plaintiff who was instrumental in development of the Cheetah sulky; 2) the sudden and total demise of the plaintiff's business, when the delay in implementing the new standard would have

tended to lead to a more gradual dropoff in business; 3) the actual economic performance of the plaintiff, which indicated very little profit over the life of the business; and 4) competition to the plaintiff's product from manufacturers of cheetah-style sulkies, which could have cut into any projected future earnings.

The USTA correctly notes that an antitrust plaintiff must "establish, with a fair degree of certainty, that the [antitrust] violation was a material element of, and a substantial factor in producing, the injury." Greater Rockford Energy Technology v. Shell Oil Co., 998 F.2d 391, 401 (7th Cir. 1993). Given the other factors in the instant case which could have caused the plaintiff's demise, the USTA argues that the following quote from Greater Rockford is controlling here:

> Standing alone, one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question. Taken together, however, the plaintiffs have failed to show with a fair degree of certainty that "but for" the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain. Consequently, as a matter of law the plaintiffs have failed to show antitrust injury[.]

Id. at 404.

The plaintiffs emphasize that, notwithstanding other possible factors contributing to its loss, the requisite causal

connection is established for antitrust purposes by demonstrating that the USTA's conduct was "a substantial or materially contributing factor" in its injury. Irvin Industries Inc. v. Goodyear Aerospace Corp., 974 F.2d 241, 245 (2d Cir. 1992) (quotation omitted).

In the event a court of appeals would find sufficient evidence to support a finding of conspiracy which substantially affected trade in the relevant market, it follows that a jury could reasonably find that the resulting harm was a "substantial or materially contributing factor" to the demise of the plaintiff. The other factors cited by the defendant might have operated to reduce the damage attributable to the antitrust violation, and it is entirely possible the jury took those factors into consideration when awarding significantly less damages than the plaintiff's expert suggested. In the event of a conspiracy finding, the plaintiff will have provided sufficient evidence upon which a jury could have found a substantial part of its injuries properly attributable to antitrust violations.[14]

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[14] In other words, the Court's previously expressed view that a reasonable jury could not have found a conspiracy necessitates the conclusion that there was no antitrust injury. However, were an appellate panel to disagree with the Court's analysis in Part A supra, the Court is of the view that a conspiracy could have produced antitrust injury.

3. Did the Evidence Support the Tortious Interference Claims?

The USTA claims that the evidence does not support the jury's findings of tortious interference with business relations and tortious interference with potential business relations. The USTA argues the plaintiff failed to prove the existence of a "valid, enforceable" business relationship with which the USTA interfered. (Brief at 20).

"The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." A & B-Abell Elevator Company, Inc. v. Columbus/Central Ohio Building & Construction Trades Council, 73 Ohio St. 3d 1, 14 (1995) (citing cases). Significantly, the Supreme Court of Ohio spoke in the plural, referring to two distinct torts, one for tortious interference with a business relationship and the other for tortious interference with contract rights. Impliedly, a business relationship does not require the existence of a "contract" to be actionable.

The USTA's assertion that Ohio law mandates an "enforceable" business relationship is too narrow. The jury was instructed it must find "the existence of a business relationship or relationships between the plaintiff and purchasers of sulkies" to find for the plaintiff on the tortious

interference with business relations claims.[15] (Instructions at 31). The evidence showed the plaintiff had a relationship with a distributor, Big D's Tack and Harness Supply. Dennis Hosterhat, owner of Big D, testified he sold "all I could get" of the plaintiff's sulkies. (Test. at 395). Arguing there was no legitimate business relationship would require a tortured construction of the facts. The USTA's objection on this point is without merit.

The USTA also argues these state tort claims should fail because the plaintiff failed to prove 1) specific intent to harm and 2) that the USTA's actions were not privileged. This whole case was, to a certain extent, about whether the USTA had a specific intent to harm the plaintiff. The Court's finding in Section A supra compels it to conclude the plaintiff has not shown that the USTA had a specific intent to harm it. However, if an appellate court found sufficient evidence of conspiracy, it would follow that the USTA had a specific intent to harm the plaintiff. Such an intent also would defeat any privilege the USTA could assert because the privilege only applies when the defendant is pursuing "lawful, independent business goals" (Instructions at 34).

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[15] On the second claim, for tortious interference with *prospective* business relationships, the jury was instructed it must find "a reasonable expectation of one or more business relationships with the probability of future economic benefit to the plaintiff." (Instructions at 32).

4. Were the Damages Based on Mere Speculation?

The Court dismisses the USTA's objection on the speculative nature of damages. "Once the existence of damages has been shown, all that an award of damages requires is substantial evidence in the record to permit a factfinder to draw reasonable inferences and make a fair and reasonable assessment of the amount of damages." Grantham & Mann, Inc. v. American Safety Prods., Inc., 831 F.2d 596, 601-02 (6th Cir. 1987) (citations omitted).

Given the fact that the plaintiff's expert testified that damages could have reached well into seven figures,[16] the jury's award was relatively modest. The expert's testimony provided the "substantial evidence" necessary to justify the $650,000 award. Id.

The defendant poses several considerations which would have justified a lesser jury award. However, the brief does little more than support the notion that the jury could have returned a lesser number. It does not prove that the jury must have done so, based upon the evidence at trial.[17]

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[16] The expert, Michael Zeleznik, testified that lost profits could range between $1,669,894 and $4,144,393, depending upon the amount of market share attributed to the plaintiff's product. (Test. at 592, 600-01).

[17] The USTA assaults the figures provided by the plaintiff's expert and asserts that the plaintiff would never have reached

The Court also notes that while the defendant now excoriates the jury verdict, it spent not one moment of its closing argument attempting to persuade the jury on the issue of damages. Having passed on the opportunity to argue the issue to the jury, it is engaging in a post-verdict argument to the Court. The Court is of the view that, assuming an appellate court would find a conspiracy to be a reasonable conclusion, the jury's verdict was supportable by the evidence of the case.

5. Does the Alleged Bias of Witness Gervat Mandate a New Trial?

The USTA claims that developments after the trial cast fatal doubt upon the testimony of a witness for the plaintiff, Dan Gervat of Nassau Turf Equipment Corporation ("Nassau"). On August 7, 1997, Nassau filed its own Section 1 antitrust action against the USTA based upon the latter's adoption of the sulky standardization rule.

The USTA cites Gervat's testimony that Jerald Sulky was only the third-largest manufacturer of sulkies. (Tr. at

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the market share that the expert projected. The jury apparently agreed with the USTA, because it awarded a far lesser dollar figure than even the smallest damage estimate provided by the expert. Having made the factual findings it made, the damages figure provided by the jury was not unreasonable.

479, 541). The USTA points out that the parties had stipulated that Jerald was the market leader. Gervat's downplaying of Jerald's market position was used by the plaintiff's damages expert to enlarge the plaintiff's damage figure, according to the USTA.[18] The USTA states in conclusory fashion that "Gervat's market share testimony was clearly biased, as Mr. Gervat was attempting to bolster damages in his own lawsuit against the USTA." (Memo at 26).

This argument is without merit. First, the only thing "newly discovered" is the fact Gervat's company filed a lawsuit after judgment was rendered in this case. And the general rule is that "the evidence must have been in existence at the time of trial" to qualify as newly discovered evidence. Wright, Miller & Kane, Federal Practice and Procedure, at §2859.[19] Second, it is far too speculative to conclude that the

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[18] These citations indicate Gervat was speaking directly of sales of bent-shaft sulkies, not overall sulkies. However, it does appear Gervat's description of Jerald as third-place in the market may have had a bearing on the expert's estimate of actual number of sales sold each year. See testimony of Michael Zeleznik at 612.

[19] The USTA's argument that the bias existed at the time of trial but was not discovered until thereafter is an exercise in semantics. The only way the USTA could impeach Gervat

jury relied upon Gervat's erroneous estimate of Jerald's market strength, especially considering the fact that the jury had the fact stipulation, providing the correct version of Jerald's position in the market. As mentioned in the previous section, the jury reduced the damages far below what the plaintiff's expert suggested. The evidence taken as a whole does not support the conclusion that the verdict was tainted by the testimony of Gervat.

6. Was the Jury Misled by Improper Argument or by Deficient Jury Instructions?

The USTA contends the jury was misled by inflammatory and erroneous statements made in arguments by plaintiff's counsel. However, the USTA did not seek a mistrial on this basis at the time of the purported improper arguments. The USTA never lodged a single objection at trial to the plaintiff's arguments. By failing to raise an argument at the proper time, the USTA attempts to place the Court in the position of being required, *sua sponte*, to ferret out wrong portions of arguments.

"A principle that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result." Wright, Miller & Kane, Federal

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based upon his company's lawsuit was to raise the fact of the lawsuit, which was not filed until after the trial.

Practice and Procedure, at §2805. See also United States v. Walton, 909 F.2d 915, 924 (6th Cir. 1990). Given counsel's failure to object, the Court's inquiry now is restricted to whether plaintiff's counsel's comments were of such a fundamentally erroneous character that they produced gross injustice. In the overall context of a two-week lawsuit featuring more than two dozen witnesses, the remarks of plaintiff's counsel were not likely to have affected the verdict. See City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980). This is particularly true when the Court cautioned the jury on several occasions that the arguments of counsel were not to be considered as evidence in the case.

The USTA raises three purported errors in jury instructions justifying setting aside the verdict. First is the Court's "failure ... to instruct the jury that the USTA could not have been in a 'conspiracy' with its own agents." (Brief at 32). According to the USTA, the instructions "left open the possibility that the jury found the USTA to be one conspirator and its employees and agents to be the other co-conspirator." (Id. at 33).

The lack of merit in this argument is apparent upon a cursory examination of the instructions, which repeat several times the requirement that the USTA conspire with a manufacturer. See Jury Instructions at 12 (stating plaintiff must prove that the USTA "conspired with others, i.e., one or more sulky manufacturer competitors of the plaintiff") and 19

("[i]n order to succeed, plaintiff must prove that the USTA conspired with at least one manufacturer..."), and Interrogatory 1 (asking whether plaintiff has proven that USTA "conspired with one or more sulky manufacturers").

Second, the USTA alleges the Court improperly allocated the burden of justification of the regulation which standardized sulkies. The Court has noted previously that there is no case law directly on point. After much consideration, the Court concluded the best way to reconcile the existing law was to impose the burden on the plaintiff to prove a conspiracy and a substantial effect on the relevant market. If the plaintiff reached these two hurdles, the Court concluded the burden was properly upon the defendant to show the restraint was justified as a legitimate form of industry self-regulation.

The USTA argues that "[r]epeated references in Plaintiff's closing to the USTA's burden of proving justification for the regulation suggest that portion of the Charge was also seriously misunderstood." (Brief at 33). However, the portion of the record cited to support this argument indicates plaintiff's counsel correctly summarized the respective burdens:

> But on several issues you'll notice in the instructions the burden shifts to them. One of the places right in the jury charge is they have to show that the standard that they used was reasonable. *Once we show that it affected*

> *competition and there was a conspiracy*, they have to show -- it's right in the charge and it's interrogatory number 3 -- they have to show that what they did is reasonable. They have that burden.

(Tr. from 7/29/97 at 94-95) (emphasis added). There is nothing incorrect or misleading about the foregoing statement.

The final objection to the jury charge is the Court's failure to instruct the jury that damages could not accrue, with respect to lack of sales state by state, after the date on which each state's racing commission adopted the sulky standardization regulation. The Court does not accept that argument because the evidence has indicated that state racing associations tend to accept whatever standards are approved by the USTA. Because the USTA is the impetus for state action, it cannot use the state commissions as a shield.

IV. CONCLUSION

For the reasons discussed above, the Court grants the defendant's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). The Court also conditionally grants the defendant's motion for a new trial pursuant to Rule 59 on the ground that the jury's finding of conspiracy was against the great weight of evidence.

Disposition of the case in this manner renders moot the plaintiff's petition for attorney fees (Docket No. 193) and bill

of costs (Docket No. 197) because the plaintiff is no longer a prevailing party.

The Court shall publish a judgment entry contemporaneously with the issuance of this memorandum opinion.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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MEMORANDUM OPINION

U.S. District Court Case No. 1:93-CV-1814
Filed September 3, 1996

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Pages C-1 thru C-36

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Super Sulky, Inc., dba Cheetah Super Sulky, Inc.,	)
	)Case No. 1:93-CV-
Plaintiff,	)1814
	)
vs.	)MEMORANDUM
	)OPINION
United States Trotting Association, et al.,	)
	)
Defendants.	)

I. INTRODUCTION

This case was transferred to the docket of the undersigned from the docket of Chief Judge George W. White on May 6, 1996. Judge White had assigned the case to Magistrate Judge Patricia A. Hemann for the consideration of dispositive motions. The plaintiff alleges violations of federal antitrust law and related state law, claiming that the defendant United States Trotting Association conspired with

manufacturers of horse racing sulkies to drive plaintiff's type of sulky out of the market. The sole defendant remaining in the case, the United States Trotting Association, moved for summary judgment (Docket No. 49). Magistrate Judge Hemann issued a 40-page Report and Recommendation ("R&R") (Docket No. 77) recommending that the motion be granted as to Count II of the complaint and denied as to Counts I, III, IV and V. Both parties filed timely objections to the R&R, and the Court entertained oral argument on August 20, 1996. Upon careful consideration, the Court adopts the recommendation of the magistrate judge that summary judgment be denied with respect to Counts I, III, IV and V and granted as to Count II, but the Court grounds its conclusion upon different analysis than the magistrate judge.

II. BACKGROUND FACTS

Plaintiff Super Sulky Inc., doing business as Cheetah Super Sulky, Inc. ("Cheetah"), alleges violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2) and seeks private enforcement pursuant to Sections 15 and 26 of the Clayton Act (15 U.S.C. §§ 15 and 26). Cheetah asserts pendent state claims for violation of the Uniform State Antitrust Act, Ohio Rev. Code § 1331.01 et seq., as well as state common law claims of interference with a business relationship and interference with prospective business relationships. Cheetah alleges that the United States Trotting Association ("USTA") conspired with sulky manufacturers to

restrain trade by excluding the racing sulky manufactured by Cheetah from harness racing. Cheetah named the USTA, individual members of the USTA, and manufacturers of racing sulkies and their officers as defendants. Eight defendants were dismissed by Judge White for lack of personal jurisdiction (Docket Nos. 27 and 28), two defendants were voluntarily dismissed by Cheetah (Docket No. 57), and six defendants were dismissed by this court for lack of prosecution (Docket No. 88). The USTA is the sole remaining defendant in the case.

The USTA is a nonprofit Ohio corporation established in 1932 for the purpose of promoting harness racing in the United States. Its approximately 30,000 members include owners, breeders, trainers and drivers of horses, as well as representatives of all racing tracks in the United States. The USTA establishes rules, registers horses, and licenses owners and drivers. It has authority to impose penalties and fines; as well as to suspend or expel members for any misconduct detrimental to the sport of harness racing. The association's offices are located in Columbus, Ohio.

Harness racing began at agricultural fairs but is now most prevalent at commercial tracks which sanction wagering. Each state legislature has enacted statutes governing the conduct of racing at commercial tracks within the state. The statutes are enforced by state racing commissions. Initially, most of the state racing commissions adopted the rules and regulations of the USTA. Today, the

rules adopted by the USTA are not necessarily followed by the individual state racing commissions. The USTA, however, directly enforces its rules at county fairs, where it may revoke the license of a judge who does not follow the USTA rules.

Antitrust allegations in this case revolve around manufacture of sulkies. A sulky (also referred to as a bike) is the lightweight 2-wheeled buggy in which the driver sits during a harness race. The sulky is attached to the horse by two metal or wooden shafts. In the traditional sulky, the shafts are fairly straight. In 1992 Cheetah began to manufacture a bent-shaft designed race sulky called the "Cheetah Super Sulky."[1] Although Cheetah was not the first company to manufacture a bent-shaft sulky, it implemented design innovations and quickly established itself in the harness racing circuit. Drivers using the Cheetah sulky set several track records. Cheetah, which was formed in early 1992, generated $225,466 in sales in the second half of 1992. (Pl. Exh. 5).[2] Because of Cheetah's success, other

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[1] A bent-shaft sulky apparently has an aerodynamic advantage over a traditional sulky because its narrow features create less wind resistance during a race.

[2] The Cheetah sulky sold for $1,295 without wheels. (Depo. of Cheetah president Craig Stein, Pl. Ex. 11, at 106). This is comparable to the cost of other sulkies in the market.

manufacturers began to produce bent-shaft sulkies.

At its annual meeting in February 1993, the 60-member USTA Board of Directors had on its agenda the topic of sulky safety and standardization. USTA liaison officer Kent Hastings convened a panel to address the board regarding the safety of newer designed sulkies. The speakers included two harness racing drivers;[3] David Seitz, the president of Jerald Sulky, a major sulky manufacturer; and Jim Reynolds, the director of the Illinois Harness Horseman's Association, which had recently banned the Cheetah-style sulky from its tracks. The speakers told the board that newer (i.e., bent-shaft) sulkies were unsafe and were confusing to bettors at the track, presumably because they helped increase the speed of the horses. All panelists advocated standardizing the measurements of sulkies, and most suggested adopting measurement standards similar to the measurements of traditional sulkies.

The Board of Directors responded by passing a resolution calling for the USTA to "work to establish a committee to look into the issue of racing sulkies with a view towards obtaining information relevant to the proposals for legal standardization of sulky size and dimensions, possible

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[3] In addition, a letter was read from a third driver John Campbell, one of the most prominent drivers in the sport, who recommended standardizing sulkies and eliminating bent-shaft sulkies.

establishment of legal testing standards and rendering assistance to State Racing Commissions and State Legislators in the establishment of legal policies and guidelines prescribing procedures for standardization, in terms of configuration, construction and reliability." (Pl. Exh. 25).

The USTA invited owners, breeders, drivers, trainers and representatives of tracks, horsemen associations, and racing commissions to join the sulky committee. The committee did not include representatives of the sulky manufacturers. Not all of the members of the committee were members of the USTA. The committee met five times between April and August of 1993. Most of the sulky manufacturers, including Cheetah, submitted written information and/or made oral presentations to the committee. The committee conducted a poll of USTA licensed drivers regarding their opinions of the safety of harness racing sulkies. There was a 37% response rate, with 57% of the respondents indicating they believed that the Cheetah style sulky was unsafe.[4]

Prior to the formation of the sulky committee, USTA regulations simply required a sulky to have two shafts, two wheels and a driver's seat. Before disbanding, the sulky committee recommended that the USTA adopt rules that would standardize sulkies. One of the proposed rules

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[4] The full survey results are in Exhibit B of the USTA's motion for summary judgment.

specified that inside-to-inside measurements of a sulky should be no narrower than 42 inches and no wider than 52 inches. This rule in effect would ban use of the Cheetah sulky, which has an inside-to-inside measurement of approximately 19 inches. On August 11, 1993 the USTA issued a press release announcing the committee's proposed rules. According to the affidavit of Cheetah's president, Cheetah's sales dropped dramatically after issuance of the press release, and in September 1993, the company stopped selling sulkies. (Pl. Exh. 29).

At its March 1994 annual meeting the USTA Board of Directors adopted the sulky committee's proposed standards with minor modifications not relevant to this case. All bent-shaft sulkies or sulkies not within the 42-52 inch range were thus banned from USTA-sanctioned events. Since that time all state racing commissions have adopted the USTA standards with the exception of the state of Maine.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Inc., 369

U.S. 654, 655 (1962). See, e.g., U.S. v. Hodges X-Ray, Inc., 759 F.2d 557, 562 (6th Cir. 1985) and cases cited therein. The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of the responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Once the moving party satisfies his or her burden to show an absence of evidence to support the nonmoving party's case, Celotex Corp. v. Catrett, 477 U.S. at 323, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rules does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves...." Celotex Corp. v. Catrett, 477 U.S. at 324. General averments or conclusory allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Furthermore, unsworn statements and affidavits composed of hearsay and

non-expert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded. See Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 968-69 (6th Cir. 1991) (quoting State Mutual Life Assurance Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979) and citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17 (1970)). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts ... earlier deposition testimony." Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986) (citing Biechell v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984)).

On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, 477 U.S. at 248. Non-material facts will not be considered. Neither will the judge attempt to weigh the material evidence or determine its truth. Anderson v. Liberty Lobby, 477 U.S. at 249. The judge's sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. (citations omitted).

Where the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323 (equating the standard for a directed verdict under Rule

50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. Anderson v. Liberty Lobby, 477 U.S. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam) and First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)). "'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

IV. STANDARD OF REVIEW AND DISPOSITION OF COUNT II

Under 28 U.S.C. § 636(b), any party objecting to a magistrate judge's report and recommendation is entitled to *de novo* review of the portions of the report to which objections are made.

The plaintiff did not raise objections to the magistrate judge's recommendation that summary judgment be granted

with respect to Count II of the complaint. Thus the plaintiff is not entitled to *de novo* review of the magistrate's recommendation with respect to Count II. The Court has read the portion of the report and recommendation concerning Count II, finds the magistrate's reasoning sound, and hereby adopts that portion of the report. The USTA's motion for summary judgment is therefore granted with respect to Count II.

Both parties objected to parts of the magistrate judge's findings and recommendations with respect to Count I of the complaint. The Court thus will engage in a *de novo* review of the report and recommendation with respect to Count I.

V. PLAINTIFF'S ANTITRUST CLAIMS

The magistrate judge bifurcated her analysis of Count I of the complaint, which alleged a violation of Section 1 of the Sherman Antitrust Act, into two separate claims. She analyzed Count I under two distinct theories 1) that the USTA conspired with sulky manufacturers to eliminate competition in the market for harness racing sulkies by means of a group boycott of the bent-shaft sulky; and 2) that, aside from conspiring with others, the USTA's new regulation amounted to concerted action within its own membership to restrain trade. The Court will consider these arguments separately.

A. The Underlying Law

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1,

applies to any "contract, combination ..., or conspiracy" between two or more persons to unreasonably restrain trade in interstate commerce. To establish a § 1 violation, a plaintiff must establish 1) a contract, combination or conspiracy; 2) affecting interstate commerce; 3) which imposes an unreasonable restraint on trade. White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983). To survive summary judgment, Cheetah must demonstrate there is a genuine issue of material fact to satisfy each element of this test.

To support a claim of antitrust conspiracy, a plaintiff must present evidence that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). A plaintiff rarely has access to direct evidence of conspiracy. Thus the law allows a plaintiff to use circumstantial evidence to infer the existence of a conspiracy through business behavior indicating "a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement." Nurse Midwifery Associates v. Hibett, 918 F.2d 605, 616 (6th Cir. 1990), cert. denied, 502 U.S. 952 (1991) (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)). However, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 588 (1986). The mere fact that a group of defendants'

conduct is consistent with an illegal conspiracy does not support an inference of antitrust conspiracy. Id.; Nurse Midwifery, 918 F.2d at 616. To survive summary judgment, a plaintiff must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588 (quoting Monsanto, 465 U.S. at 764). In other words, the nonmoving party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." Matsushita, 475 U.S. at 588.

Relying upon Monsanto and Matsushita, the Sixth Circuit has adopted a two-part inquiry to determine whether circumstantial evidence can support an inference of conspiracy: 1) is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy, and if so, 2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests? Riverview Investments v. Ottawa Community Imp., 899 F.2d 474, 483 (6th Cir.), cert. denied, 498 U.S. 855 (1990). The magistrate judge properly examined Cheetah's antitrust conspiracy complaint under the Riverview two-part theory.

B. Application of the Law to the Evidence

The magistrate judge found that the evidence supporting a conspiracy between the USTA and sulky manufacturers was

ambiguous, i.e., consistent both with a conspiracy and with independent action. (R&R at 19). Applying the second part of the Riverview test, the magistrate found that "the inference of a conspiracy between the sulky manufacturers and the USTA is less than or equal to an inference of independent action.... Cheetah failed to produce evidence *excluding the possibility* that the USTA acted independently." (Id. at 20) (emphasis added).

Upon review of the case law and the evidence, the Court is of the view that the magistrate placed too heavy a burden on Cheetah at the summary judgment stage. First, Cheetah is not required to produce evidence "excluding" the possibility of independent conduct; it has the lesser burden of producing evidence "tending to exclude" such possibility. The difference is subtle but important, and the Court is of the view that Cheetah has produced sufficient evidence which, while not excluding the possibility of independent conduct, should be construed at the summary judgment stage as "tending to exclude" the possibility of independent conduct.

The record includes evidence which, construed in Cheetah's favor, could support the following findings:

1. Bent-shaft sulkies in general, and Cheetah sulkies in particular, were gaining an increased share of the market for sulkies.

2. The leading sulky manufacturers other than

Cheetah met (outside the presence of the USTA) and agreed to work for a ban of the bent-shaft sulkies.

3. At approximately the same time, the USTA, which in its 60-year history had never issued regulations governing the size of sulkies, created a committee to study whether sulkies should be standardized.

4. An impetus for the USTA Board of Directors' decision to convene a sulky committee was a panel discussion, arranged by the USTA's Kent Hastings and consisting of panelists, including a rival sulky manufacturer, who unanimously recommended standardization. (There is evidence in the record that the industry as a whole was divided over the issue, and a jury could find that the panel was stacked in favor of traditional manufacturers).

5. The USTA made no effort to ensure objectivity of committee members, and some members had previously expressed hostility toward the Cheetah sulky, including committee co-chairman Pat Salerno who, according to the affidavit of sulky manufacturer Dan Gervat, attended the meeting at

which manufacturers decided to attempt to ban the bent-shaft sulky. (Pl. Exh. 28).

6. The USTA allowed sulky manufacturers to have direct impact in drafting the critical rule banning the Cheetah sulky. Hastings testified in deposition that, although he took the committee notes on what would become standardized sulky dimensions, the dimensions "are recommendations from sulky manufacturers. I had requested that they submit to us what they felt a sulky should be and what the dimension should be." (Hastings depo. at 107).

7. When it adopted a range of inside-to-inside sulky measurement of 42 inches to 52 inches, the committee was aware it would destroy Cheetah as a competitor. Hastings' notes beside the draft proposal on measurements include the remark, "Eliminates 'Cheetah' style bikes" (Pl. Exh. 6).

8. Although the primary purpose of the rule purportedly was to improve sulky safety, the committee had no objective evidence supporting the proposition that bent-shaft sulkies were less safe than traditional sulkies. Although the USTA cites an unscientific drivers' survey indicating

support for the banning of bent-shaft sulkies for safety reasons, the rule was drafted by the sulky committee during June -- prior to the compilation of the drivers' survey results.[5]

9. As a result of the committee's proposed rule, Cheetah sales dropped dramatically, and production ceased within a few months.

A jury examining these facts could reasonably reach two differing conclusions. A jury could conclude that the USTA's role in these proceedings was benign and that it lacked the necessary "conscious commitment to a common scheme designed to achieve an unlawful objective" to be liable for an antitrust violation. Monsanto, 465 U.S. at 764. However, a jury also could conclude there was a pattern of activity indicative of an unlawful conspiracy. Construing inferences in favor of the plaintiff as required at the summary judgment stage, the Court finds that the plaintiff has presented evidence

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[5] The USTA objects to Cheetah's assertion that the survey played no real role in the decision by the sulky committee. The USTA points out that the committee did not finalize its decision until after compiling the survey results. However, a jury could find the survey's credibility hampered both by the lack of any scientific basis and by the anonymity of the respondents.

raising a genuine issue of material fact that the USTA participated in a conspiracy to restrain Cheetah's product. The Court thus takes exception to the magistrate judge's conclusion that Cheetah "failed to produce evidence excluding the possibility that the USTA acted independently." (R&R at 20).[6]

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[6] The Court believes the magistrate judge's quarrel was with the *quantum* of evidence produced by Cheetah. Citing Riverview, she found that the Cheetah's inference of a conspiracy was "less than or equal to an inference of independent action." (R&R at 20). Although such language is present in Riverview ("A plaintiff thus fails to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action," 899 F.2d at 483), the Court believes a literal application of such language requires an inappropriate degree of weighing evidence. An examination of the context of the language in Riverview indicates that the Sixth Circuit's focus was on Part 2 of the test announced in that case, i.e., if the evidence is ambiguous "is there any evidence that tends to exclude the possibility that the defendants were pursuing ... independent interests." Id. The Court thus believes the proper inquiry on summary judgment is not a "less than or equal to" standard, but rather whether there is "any evidence that tends to exclude" the possibility of independent conduct. This is consistent with the Supreme Court's language in

The magistrate judge grounded her conclusion in part on a finding that "[t]here is simply not enough evidence to infer that the [sulky] committee or the USTA Board of Directors, *as a whole*, conspired with sulky manufacturers, or that two or three members of the safety committee controlled the actions of the 76 other individuals involved in the USTA's adoption of the sulky rule." (R&R at 20) (emphasis added).[7] However, under principles of agency law there is no need to find that the Board "as a whole" consciously participated in the conspiracy. The Supreme Court in American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) held that a defendant is civilly liable for the antitrust violations of its agents committed with apparent authority. Antitrust violations committed by anyone cloaked with the USTA's authority -- including its liaison officer Hastings and arguably the sulky committee itself -- could be imputed to the

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Matsushita that the nonmoving party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." Matsushita, 475 U.S. at 588.

[7] The reference to "76 other individuals" apparently refers to the 60-member USTA Board of Directors and the members of the sulky committee who were not shown to have possible conspiratorial motives.

USTA.[8]

Having found that Cheetah has raised a genuine issue of material fact that the USTA participated in a conspiracy to restrain trade, the Court thus turns its inquiry to the remaining elements constituting a Section 1 claim, i.e., whether the conspiracy affects interstate commerce and whether it imposes an unreasonable restraint on trade.[9] See White & White, 723 F.2d at 504. There is no dispute that the alleged

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[8] The USTA takes great pains to distance itself from the sulky committee, arguing that it was an "industry-wide" committee separate from the USTA itself. Magistrate Judge Hemann aptly rejected such a distinction: "The USTA Board of Directors voted to establish the committee. Members of the committee were drawn from the USTA membership. The USTA's legal counsel attended sulky safety committee meetings. The purpose of the committee was to make recommendations to the USTA. The USTA issued the press release announcing the sulky safety committee's recommendation of a ban of the bent-shaft sulky." (R&R at 10 n.2).

[9] A restraint of trade analysis generally requires definition of the relevant product and geographic markets. In this case there is no dispute that the relevant product market is buyers of sulkies, and the relevant geographic market is the United States.

conspiracy affected interstate commerce, as Cheetah products were sold and used in race tracks throughout the United States.

Thus the final inquiry for purposes of Section 1 is whether the alleged conspiracy imposed an unreasonable restraint on trade. There are two standards for evaluating whether a restraint of trade is unreasonable: the *per se* rule and the rule of reason. As the Supreme Court stated in National Society of Professional Engineers v. United States, 435 U.S. 679 (1978):

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

Id. at 692. Thus characterizing the type of restraint is necessary to determine whether the *per se* rule or the rule of reason applies.

Characterizing the type of restraint in this case poses a unique problem because of the diverse nature of the alleged conspirators. The defendant USTA is a different type of entity from its alleged co-conspirators. The alleged co-conspirators are manufacturers who were in direct

competition with Cheetah. The USTA, on the other hand, is an association with quasi-regulatory powers affecting Cheetah. The parties have cited no authority, and the Court has been unable to find a case, containing the hybrid type of conspiracy alleged here. Cheetah argues that the USTA is part of a group boycott of its product, a type of restraint normally considered *per se* unreasonable. The USTA characterizes its conduct in adopting the sulky standard as a horizontal restraint on competition, typically analyzed in the sports regulation context under the Rule of Reason. See, e.g., Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781 (7th Cir. 1981).

Thus the factual circumstances present the Court with a case of first impression in terms of characterization of conduct. The evidence viewed in the light most favorable to the plaintiffs raises a genuine issue of material fact that the USTA, acting in concert with certain sulky manufacturers, intentionally devised a rule for the purpose of protecting manufacturers of traditional sulkies and driving Cheetah out of business. The Court is of the view that such conduct is best characterized as *per se* illegal, requiring no further inquiry to determine whether such conduct poses an unreasonable restraint on competition. The conduct is analogous to a group boycott, a type of activity generally considered *per se* illegal as "a concerted attempt by a group of competitors at one level to protect itself from competition

from non-group members at that level." Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978). And although the USTA is not a "competitor" with Cheetah in the sense that the alleged co-conspirators are competitors, "the boycotters and the ultimate target need not be in a competitive relationship with each other." St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 543 (1978).[10]

Applying the *per se* rule rather than the Rule of Reason does not change the outcome of the summary judgment motion because the Court would find that the conduct alleged by Cheetah, if believed by a jury, would violate the Rule of Reason as well. The Supreme Court first explained the Rule of Reason Chicago Board of Trade v. United States, 246 U.S. 231 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps

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[10] Use of the *per se* test finds support in another case involving the USTA, United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781 (7th Cir. 1981). The Seventh Circuit eschewed use of the *per se* test in that case involving a challenge to USTA regulations. However, one of the reasons the court applied the Rule of Reason rather than the *per se* test was that the record contained "no indication ... of any subtler scheme, as for example groups of drivers or owners using USTA as a means to eliminate other drivers or owners, ..." Id. at 788.

> thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before or after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238. The Supreme Court has since warned, however, that Chicago Board of Trade should not be interpreted to shift the focus of the Rule of Reason in any direction other than whether the challenged restraint harms competition. In National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), the Court stated:

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions.

...

> The test ... is whether the challenged contracts or acts were unreasonably restrictive of competitive conditions. Unreasonableness under that test [can] be based either (1) on the nature of character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. *Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.*

Id. at 688, 690 (emphasis added) (quotation and citation omitted).

Thus focussed on the impact of the USTA regulation on competitive conditions, the Court finds that a reasonable jury could conclude that the impact was to eliminate a growing competitor to the detriment of consumers desiring to purchase the product. Such an impact cannot be construed to "merely regulate[] and perhaps thereby promote[] competition." Chicago Board of Trade, 246 U.S. at 238. Instead it helped "suppress or even destroy competition." Id.

The USTA properly points out that "the effect of a restraint of trade must be gauged according to its effect on *competition*, not *competitors*." Alabama Sportservice v. National Horsemen's Ass'n, 767 F.Supp. 1573, 1580 (M.D.Fla. 1991) (citing Brown Shoe Co. v. U.S., 370 U.S. 294, 320 (1962) (emphasis in original)). As a general rule,

the elimination of one particular competitor is not necessarily a violation of the antitrust laws. In response, Cheetah argues that the record supports a finding that the sulky standard serves to "deprive some consumers of a desired product,[11] eliminate quality competition, exclude rival producers,[12] or facilitate oligopolistic pricing." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 592, 500 n.7 (1988) (quoting 7 P. Areeda, Antitrust Law ¶1503, p.373 (1986)). If Cheetah can convince a jury that the USTA conspired to eliminate bent-shaft sulkies, it would naturally flow that the elimination of Cheetah wiped out a strong competitor in the market of harness racing sulkies, harming consumers who no longer had access to a desired product. The evidence indicates there are a limited number of sulky manufacturers in the market. Given the narrowness of the particular market at issue, the driving out of one competitor effectively reduces competition sufficiently to trigger the protection of the antitrust laws.[13]

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[11] Cheetah provided copies of approximately 100 signatures on petitions circulated at Saratoga Raceway in New York opposing ban of the bent-shaft sulky. (Pl. Exh. 20.)

[12] The affidavit of Cheetah president Stein is evidence that the rule in effect excluded a manufacturer who was a rival of traditional sulky manufacturers.

[13] The Court flatly rejects the USTA's argument that the new

Some courts permit a somewhat broader inquiry under the Rule of Reason. While noting that the focus must remain on the impact on competitive conditions, they acknowledge that certain factors such as safety may legitimately be considered by rulemakers under certain circumstances. In Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), cert. denied, 467 U.S. 1210 (1984), chiropractors claimed the defendant AMA violated Section 1 by refusing to

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regulation actually promoted competition because Cheetah was so successful it could have driven other manufacturers out of business. Extending this argument to its logical conclusion, competitors in an industry would be permitted, in the name of competition, to conspire to destroy any new competitor with an improved product which threatens to make the current product obsolete. This is not what antitrust laws were designed for. As the Sixth Circuit said in Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413 (6th Cir. 1990), cert. denied, 502 U.S. 899 (1991), "Competition is a ruthless process. A firm that reduces costs and expands sales injures rivals -- sometimes fatally.... These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for rivals' wounds." Id. at 1422 (quotation omitted). Magistrate Judge Hemann put forth the proposition succinctly: "There is no antitrust violation where a better product drives competitors out of the market." (R&R at 23).

permit its members to deal professionally with them. The Seventh Circuit considered the AMA's argument that its rule, referred to as Principle 3,[14] was promulgated in the name of patient safety:

> A value independent of the values attributed to unrestrained competition must enter the question. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason to as virtually to exclude other values (except, for example, the value of activity protected by the first amendment), the adaptation of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would justify conduct having significant anticompetitive effect.

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[14] The text of Principle 3 was as follows: "A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily professionally associate with anyone who violates this principle." Wilk, 719 F.2d at 213. The AMA interpreted the rule to prohibit associations with chiropractors, labeling the medical profession of chiropractic an "unscientific cult." Id. at 213.

> ... The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern ... could not have been adequately satisfied in a manner less restrictive of competition.

Wilk, 719 F.2d at 227. Even if this Court were to generously apply the Rule of Reason to allow a factor such as safety to be considered, as did the Seventh Circuit in Wilk, the USTA would not prevail upon summary judgment. At the very least, there are factual questions whether the concern for safety was objectively reasonable and whether such concern could have been addressed in a less restrictive manner.

The USTA argues that even if it otherwise could be held liable, it is shielded by the Noerr-Pennington doctrine, which exempts from antitrust liability concerted activity to influence

governmental action which may restrain trade. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). The magistrate judge, citing Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), held that the Noerr-Pennington exception does not apply in the context of attempts to influence a private standard-setting association. Upon *de novo* review, the Court finds the magistrate judge's reasoning sound and agrees that the USTA cannot utilize the Noerr-Pennington doctrine as a shield from antitrust liability under the facts of this case. (See R&R at 35-39).

In sum, Cheetah has raised a genuine issue of material fact that the alleged conspiracy between the USTA and manufacturers unreasonably restrains trade under either a *per se* test or the Rule of Reason.[15] The Court now proceeds to examine what the magistrate judge considered as an alternative cause of action in Count I, i.e., whether the USTA's conduct constituted "concerted action" among its own membership in violation of Section 1.

B. "Concerted Action" Within the USTA

The report and recommendation engaged in an extended

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[15] By separate order, the Court will invite briefs from the parties on whether the Court should instruct the jury according to the *per se* standard, the Rule of Reason, or both.

analysis of whether Cheetah had raised a genuine issue of material fact that, aside from any purported conspiracy with sulky manufacturers, the USTA's adoption of the Cheetah-eliminating sulky standards amounted to "concerted action" among the association's membership to restrain trade in violation of Section 1 of the Sherman Antitrust Act. The magistrate judge concluded that Cheetah had produced sufficient evidence to avoid summary judgment under this theory.

The magistrate judge correctly pointed out that associations in their rulemaking or policymaking capacities can be held liable for antitrust violations. A growing body of case law supports this proposition. See, e.g., NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) (NCAA television plan constituted unreasonable restraint upon free market); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 511 F.Supp. 1103, 1114 (D.Neb. 1981), aff'd, 665 F.2d 222 (8th Cir. 1981) ("Non-profit voluntary associations which sanction and regulate professional sporting tournaments, races and other contests have been held subject to the antitrust laws in the exercise of their rulemaking authority"); Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (professional sports rule banning players with one eye is subject to antitrust analysis).

Thus Cheetah could have claimed that the USTA's adoption of the sulky standard rule violates the antitrust laws under a theory of concerted activity among USTA members

as a rulemaking body (rather than or in addition to a theory of conspiring with manufacturers). Critically, however, Cheetah made no such claim, and it is not the function of this Court to expand the lawsuit at this point in the proceedings. A careful reading of the substantive portions of Count One of the complaint fails to reveal any hint of such a claim:

> 64. The conduct of Defendants described hereinabove, constitutes a contract, combination, conspiracy and boycott among the Defendant[s] and those described in paragraph 20,[16] designed to harm the competitiveness and the trade practices of the Plaintiff by forcing it to use sulkies selected by their competitors rather than those of its own choosing, a per se violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1), and further, restrains trade and commerce unreasonably in the market of harness racing in the United States also in violation of Section 1 of

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16.

Paragraph 20 is titled "Others Who Contracted, Combined or Conspired with Defendants." It lists fifteen individuals, not named among the sixteen defendants in the original complaint, who allegedly participated in the conspiracy to ban the Cheetah. By referring to this paragraph in its Section 1 complaint, Cheetah further illustrates that it was not asserting a claim against solely the USTA on the basis of concerted action among its members.

the Sherman Antitrust Act.

> 65. The conduct of Defendants described hereinabove constitutes a contract, combination and conspiracy among the Defendants and those described in Paragraph 20 to boycott products manufactured by Cheetah Super Sulky, Inc., specifically the Cheetah Super Sulky, a per se violation of Section 1 of the Sherman Antitrust Act, and further, restrains trade and commerce unreasonably in the market for sulkies in the United States and other parts of the world in violation of Section 1 of the Sherman Antitrust Act under the Rule of Reason, by reason of which violations Cheetah has been injured in its business and property and its position in the market has been negatively impacted....

This claim clearly is lodged against a group of several alleged co-conspirators, not merely against the USTA as a single rulemaking body.

Cheetah raised the claim of "concerted action" on page 26 of a 27-page memorandum opposing the USTA's summary judgment motion. See Docket No. 59. Clearly Cheetah's focus in this lawsuit is on its claim of conspiracy between USTA and sulky manufacturers. It is too late in the game to pursue what in effect would be an entirely distinct cause of action.

Cheetah argues that, even if the complaint cannot be construed to contain an allegation that the USTA members conspired among themselves, the Court should not be constrained by the pleadings. However, the problem is not merely an omission of recital of the correct words in the pleadings. A "concerted action" claim is too large a matter to inject into the case at this point -- nearly three years after its filing and far beyond the close of discovery. Thus the Court declines to accept the magistrate judge's recommendation that summary judgment be denied on a "concerted action" claim.[17] The Court will not read into the complaint what the plaintiff could have asserted but did not.

VI. PLAINTIFF'S STATE LAW CLAIMS

Despite an extraordinary amount of briefing in this case, no party has bothered to discuss the state law claims (Counts III, IV and V) in more than conclusory fashion. The USTA merely argues that because the state claims are based upon the same conduct at issue in the federal case, the state claims must fail if the federal claims fail. Cheetah makes the inverse of the same argument, i.e., if the federal claims raise a genuine issue of material fact, the state claims must do so as well. The only distinction drawn by plaintiff is his argument

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[17] The Report and Recommendation acknowledged that Cheetah "has not developed this argument in its pleadings." (R&R at 21).

that even if his antitrust claim would fail for lack of proof of injury to competition, its tortious interference claims would survive because such claims focus solely on injury to the plaintiff.

The magistrate judge recommended that the motion for summary judgment be denied with respect to the state law claims because the USTA has not suggested that the analysis of the state claims would differ from the analysis of the Section 1 claim. (R&R at 39-40).

While the Court is of the view that the state claims contribute little if anything to this case, it agrees with the magistrate judge that the evidence and arguments put forth by the USTA are insufficient to merit summary judgment on these claims. However, as with Count I, Cheetah cannot proceed on the state claims under a legal theory of "concerted action" among USTA members. Its claims are restricted to the theory of a conspiracy between the USTA and sulky manufacturers.

VII. CONCLUSION

For the reasons set forth above, the Court adopts the magistrate judge's conclusion that the USTA's motion for summary judgment be granted with respect to Count II of Cheetah's complaint and denied as to the remaining counts. However, Cheetah's complaint under Count I, and its related state claims, shall proceed only upon the theory that the USTA conspired with sulky manufacturers to restrain trade.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

U.S. District Court Case No. 93-CV-1814
Filed December 11, 1997

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Pages D-1 thru D-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

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just said. I'll be glad to listen to you.

MR. LEVIN: Well, I mean, my one comment is I don't think it needs -- you need to talk about preponderance of the evidence specifically again, but that's a small objection.

I believe the case law is clear, you don't need to show motive in antitrust cases or in fact generally, and so motive is nowhere in your instructions before. So I'm just trying to figure out how it fits in here in this one place. I think it's improper to interject motive because I don't think you need to show motive. Stupidity and craziness and inexplicable reasons are all perfectly fine and account for most misbehavior in the world.

What I don't know is how it fits in here, in terms of preparing for close. You are listing it as one factor in judging whether or not there was a conspiracy. I'm not exactly actually sure, is that the court's intent?

THE COURT: What's the case, Bob, Sixth Circuit?

THE CLERK: Riverview Investments.

THE COURT: Are you familiar with the Riverview Investment case at 989 F.2d 474?

MR. LEVIN: I'm sorry, give me the cite again?

MR. FRYE: It's in our brief on page 4.

THE COURT: Frankly, we were surprised that the

defendant took that long to cite the case to us. We knew about the case for some time and I struggled on that case in the motion for directed verdict; pretty strong statement in that case. I'm not satisfied as it's a completely correct statement of law, and so I'm going with this as a compromise.

MR. LEVIN: Well, I'm --

THE COURT: With all due respect to Judge Kennedy, for whom I have the greatest respect, she wrote the opinion.

MR. LEVIN: I don't have the case in front of me, so I'm at a loss to defend against it. But if the case says that -- I mean, is this court's interpretation that the case says economic motivation is one factor in judging whether there is a conspiracy as opposed to an element?

THE COURT: It can be read as to say it's dispositive. It can't show it.

MR. LEVIN: That's clearly against thousands of years of common law. You don't need to show conspiracy; you don't need to show motive; you never have, it's not an element.

THE COURT: Good luck with Judge Kennedy if you win this case and get before her on this case.

MR. LEVIN: I still have some scars of a case I

APPENDIX E

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15 U.S.C. § 1

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15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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15 U.S.C. § 15

Pages F-1 thru F-3

15 U.S.C. § 15

Suits by persons injured

(a) Amount of recovery; prejudgment interest.--

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

> **(1)** whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that

such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in

which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

Supreme Court, U.S.
FILED
AUG 5 1999
OFFICE OF THE CLERK

No. 99 – 67

IN THE

Supreme Court of the United States

SUPER SULKY, INC.,
Petitioner,

v.

UNITED STATES TROTTING ASSOCIATION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The United States Trotting Association is a non-profit corporation, which has no parent corporation or publicly held company owning 10% or more of its stock.

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STATEMENT OF FACTS

1. The USTA

Since 1932 the United States Trotting Association has promulgated harness racing rules, adopted standards for the registration of horses, collected and published statistics on harness racing used by those wagering on races, and, in general, promoted harness racing in the United States and portions of Canada. The approximately 30,000 USTA members include government officials from states which have harness tracks. The membership does not include any sulky manufacturing companies. The USTA is governed by a sixty member Board elected by the membership.

The USTA neither manufactures racing sulkies, nor receives royalties or other financial consideration from those who do. No financial or economic incentive of any type was proven at trial to underlie the USTA rulemaking at issue in this case.

2. State Racing Commissions

Each State in which organized harness racing occurs has a racing commission to regulate all racing at which pari-mutuel wagering is conducted. Such races constitute approximately 93-95% of all racing and dominate the economics of the harness racing industry. Races at which USTA rules directly apply are, therefore, limited to non-wagering events, such as small county fairs. These amateur events have little economic impact upon the racing industry.

The USTA sulky design rule at issue in this case, or some variation of it, was adopted by individual states over a period of approximately two years. This reflects many factors including recognition of USTA expertise and confidence in the integrity of USTA-led investigations into matters of importance to the sport of harness racing. The USTA has no ability to "override" state-promulgated rules for harness racing. Thus, the lower courts flatly rejected Petitioner's contention that USTA rulemaking directly harmed its business:

> Here it was the actions of the various state racing commissions that were directly responsible for Super Sulky's harm, because they are the ones that make the final choices as to what type of sulkies are to be used at each track. Although the USTA's actions are highly influential, its decisions in the present case were ultimately only recommendations to the state racing commissions.
>
> 174 F.3d, at 743; App. A-22-23

3. The Sulky Industry

A harness racing driver sits behind the horse on a two-wheeled cart called a "sulky." It is hitched to the race horse by two metal or wooden "shafts." For many years the industry relied upon what were called "traditional" or "modified--traditional" style sulkies in which the shafts were fairly straight between the sulky and the horse. Even during these years the manufacturing of sulkies was a competitive business,

due to the ease of marketplace entry. No manufacturer truly dominated the industry, although most observers believed the Jerald Sulky Company of Waterloo, Iowa ("Jerald") was the "industry leader" through much of the 1980's and early 1990's. Jerald, a small, family-owned business of some 21 employees, has been in business since 1898. As Petitioner essentially concedes, new entrants into this marketplace, like Super Sulky itself, could readily compete head-to-head with Jerald. (Petition, pp. 6, 8).

Some manufacturers began experimenting in the early 1990's with a new "bent-shaft" sulky design. Nassau Sulky, a manufacturer of modified-traditional style sulkies, claimed to have first marketed a bent-shaft design. Thereafter Petitioner introduced its bent-shaft design named the "Cheetah Super Sulky" in August, 1992. Jerald entered the bent-shaft market in 1993, with its own variation on the bent-shaft design. "Cheetah" or "Cheetah-style" nomenclature became a generic reference for a subset of bent-shaft design whether or not manufactured by Petitioner.

Unlike its competitors, Petitioner manufactured only one style of sulky. When a ban on bent-shaft sulkies was first recommended in August, 1993, Super Sulky immediately ceased making anything, choosing not to compete in the modified-traditional sulky market.

4. Sulky Designs and Their Impact on Racing

The somewhat radical hourglass design of Super Sulky's "Cheetah" style bike was popular from its introduction among some drivers. The shafts were quite a bit higher on a Cheetah style bike, and the stirrups were only 7" apart (unlike the modified-traditional design in which they are 30" apart). However, the bent-shaft design almost immediately became controversial for at least two reasons: (1) concern about visibility and balance problems for drivers, and the resulting potential for race accidents or similar safety hazards; and (2) concern that the new style bikes enjoyed a slight competitive advantage over the traditional style, such that "sulky design" won races rather than the horse and driver.[1] Given the foregoing, a related concern arose over confusion or lack of adequate information among fans, and the potential effect on betting or decline in customers at tracks. Some tracks experimented with notations in their racing program to inform the public of new sulky designs, while other solutions were also considered. For example, the director of Chicago area tracks considered direct track ownership of all sulkies as a way to standardize designs and eliminate bettor confusion.

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[1] Concern about standardizing design so it did not affect race results, contrary to Petitioners statement p. 12, was evident early in the process, as the uncontradicted record shows. It did not first surface "shortly before trial when the USTA" started consulting Professor Meeks, and to suggest that conclusion is a serious misrepresentation of the factual record.

By early 1993, enough drivers were expressing concern among themselves and to their respective horsemen's associations that meetings were held within the industry outside of the USTA. Petitioner's two principals attended several large *ad hoc* meetings at which concerns were discussed by drivers and others within the industry. While some drivers liked bent-shaft and cheetah style sulkies (particularly if they perceived a greater chance of winning a close race against modified-traditional bikes,) this view was not widely shared. On the other hand, even drivers who did not like bent-shaft style bikes sometimes used them out of concern they might not be as competitive driving a modified-conventional sulky. All-time leading money-winner John Campbell, a witness at trial, was among such drivers and Petitioner's President "knew [Campbell's] opinion carried a lot of weight."

As controversy over bent-shaft style bikes grew throughout the harness racing industry, bans on bent-shaft style bikes were considered and even implemented at some racetracks. The USTA, as the only national organization whose mission was overall promotion and standard-making for harness racing, convened a panel discussion on sulky designs at its annual meeting in the Spring of 1993. Prompted by that panel discussion and the general controversy in the industry, the USTA's Board created an industry-wide sulky committee (the "Committee") at that same annual meeting. The express purpose of the Committee was straightforward, namely to render:

> assistance to State Racing commissions and State legislators in the establishment of legal policies and guidelines prescribing procedures for standardization, in terms of configuration, construction and reliability.

The USTA had created similar study committees in prior years for other purposes. Moreover, the USTA reviews its Rules and proposes changes thereto at least annually. For instance, the USTA had previously promulgated Rules respecting helmet design and a shaft design thought to be unsafe.

5. The Industry Wide Sulky Committee

Pursuant to Board authorization, the USTA's Executive Vice-President invited individuals from a variety of backgrounds to serve on the Committee. The eighteen members reflected a cross-section of the industry, and it was stipulated at trial this Committee included no sulky manufacturers. Horse owners, breeders, drivers, trainers, plus representatives of tracks, horsemen's' associations, and owners associations were invited to serve as members. Each state racing commission was also invited to designate a representative to the Committee, and ultimately ten of eighteen members of the Committee were full-time employees of racing commissions.

There was no evidence that Committee members were in any way corrupted to serve the interests of Jerald or any other sulky manufacturer. Even Petitioner's primary trial witness testified he had no basis for believing that any sulky manufacturer dictated the membership of the Committee, or that any Committee member accepted bribes or financial favors from any sulky manufacturer. While some Committee members expressed concern about bent-shaft bikes prior to the first meeting of the Committee, they were neither in the majority nor did such individuals "represent" any manufacturer. As the Court of Appeals recognized, moreover, the Committee "was not convened as a jury, but instead as a committee of knowledgeable people committed to the best interest of the sport." 174 F.3d, at 739; App. A-13.

The Committee met five times between May and August, 1993. Each sulky manufacturer was invited to make a presentation. Craig Stein, President of Petitioner Super Sulky, expressed to the Committee that he believed many drivers liked his bike, and perhaps it should be the standard. Bill Card, President of Jerald and a longtime participant in the industry, told the Committee during its deliberations he thought the modified conventional style sulky should be the industry standard. Mr. Card expressed this view even though Jerald was earning unprecedented profits selling its version of the bent-shaft bike. App. B-20.

The Committee's work was well publicized. Several of its meetings were recorded by a court reporter and those

transcripts were part of the Record below. However, when no clear consensus was readily reached on whether to standardize sulky design, Petitioner's President Stein suggested the Committee survey actual USTA member-drivers. Acting on Stein's recommendation, such a survey was conducted. No evidence at trial supported the statement (Petition, p.9) that the Committee "had determined to make the traditional sulky style *the* standard" before the USTA surveyed the drivers.

6. The Survey of Drivers

The driver survey was prepared primarily by Kent Hastings, a longtime USTA employee. Although lacking formal training in statistics, Mr. Hastings had a lifetime of relevant experience in harness racing, including service as a Judge for several state racing commissions. Uncontradicted expert testimony adduced at trial from a nationally known university professor specializing in polling, who reviewed the Committee's driver survey, proved that the survey had little margin of error and that the results were trustworthy. 3,571 surveys were mailed, and the Committee received a 36.3% response rate. Petitioner's assertion that this evidence was nothing more than "anonymous hearsay" (Pet. p.10) neither overrides the trial court's decision to admit it, nor undermines its weight.

Petitioner suggests "no concrete evidence" documented any safety issue (Pet. at 9). Yet, survey results proved that a majority of drivers who had actually used a cheetah-style or other bent-shaft sulky considered these

designs unsafe. There could hardly have been better evidence than the views of drivers who actually race every day. Sixty percent (60%) of drivers who had used such bikes thought they provided limited visibility; 52% said the bikes created driver stability problems; and 53% considered them unsafe. On the other hand, no more than two percent (2%) of drivers believed there were visibility, stability or safety problems with conventional sulkies. Seventy-eight percent (78%) of those polled believed that sulky design should be standardized using conventional sulkies as the standard.

Having received such poll results, the Committee recommended in August, 1993, that standardized sulky dimensions be adopted. The recommendations used the design and dimensions of the modified traditional sulky then marketed by several manufacturers. Without awaiting either final USTA action on the recommendation (which was not scheduled to occur until the annual meeting the following Spring) or action by any state racing commission, Petitioner filed this antitrust suit in August, 1993.

In March, 1994, the full sixty-member USTA Board considered the Committee's recommendations and, after recorded debate and some additional revisions, adopted them. The only direct impact upon commerce which this had was to limit the use of bent-shaft bikes at USTA-sanctioned events where no wagering occurred (about 5-7% of all races). State racing commissions still had to formally adopt the USTA standards before bent-shaft bikes could be eliminated wherever pari-mutuel betting was involved. Thus, one key

factual predicate – that the effect of the Committee's recommendation "was to drive from the market a strong competitor" (Pet. at 13) - is vehemently disputed.

Apparently all sulky manufacturers, including Jerald, initially lost business following announcement of the Committee's recommendations concerning standardization. As the Court of Appeals acknowledged, Jerald wrote at least one angry letter pleading for quicker action to settle the issue, and participated in discussions about formation of a manufacturers association, conduct which both lower courts recognized to be inconsistent with any notion Jerald was a co-conspirator. 174 F.3d, at 739-40, App. A-14; B-19-20. Nevertheless, Petitioner was the sole manufacturer that elected to go out of business, rather than market a product in compliance with the proposed uniform standards. Appellant closed, Mr. Stein admitted at trial, because the onset of a fatal illness for his main business partner made it "just an impossibility to make another [style] bike."

7. The Sulky Market after Standardization

Prior to the rulemaking concerning bent-shaft designs at issue in this case, the sulky manufacturing industry was made up of only nine firms in the United States. By the time of trial in 1997 eleven domestic manufacturers were in business. One knowledgeable observer testified at trial that "the competitiveness today is just as much as it's ever been, if not more. It's strong right now." Thus, the assertion by Petitioner (at 13) that the sulky market was "highly

concentrated and demand inelastic" is not supported in the Record, and no economist testified to any such conclusions.

ARGUMENT

A. Lack of Evidence of a "Conspiracy" between the USTA and Any Manufacturer

Petitioner seeks review premised largely upon the notion that this fact-specific case has inherent in it debatable questions about the proper scope of "conspiracy" analysis under §1 of the Sherman Act. Yet, that analysis has been clearly set forth since this Court's landmark rulings in the mid-1980's. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Those decisions are being applied without difficulty across the country. This is evidenced in their widespread citation, by the clarity of the Sixth Circuit opinion in this very case, and by an earlier Sixth Circuit decision, also applying *Matsushita* and *Monsanto*, viewed as "controlling" in this case. 174 F.3d, at 737-738, applying *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.) *cert. denied* 498 U.S. 855 (1990). This Petition presents nothing more than the application of well-settled precedent to a new set of facts.

All four Judges who reviewed the record of the two week trial concluded that a just result was reached in this case, and that a conspiracy was not proven, in part, because the evidence did not exclude the possibility that the USTA and its alleged co-conspirator Jerald acted independently. Beyond that, the trial judge acknowledged that "the defendant has provided affirmative evidence (although it has no burden to do so) to support a finding of independent conduct on the part of both the USTA and Jerald." (App. B-18). Thus, this case turned upon whether there was any meaningful factual support for a jury finding of conspiracy, a prerequisite to every §1 Sherman Act lawsuit, and not upon any new interpretation of federal law. The lower courts' appraisal of the factual record regarding this issue should not be disturbed by this Court.

The conclusion that no conspiracy existed is readily understood, in part, because of the absence of any meaningful evidence of "economic motive" suggesting the process followed by the USTA was an illegal sham. In setting aside the verdict (App. B-23, B-26) the experienced trial judge and carefully analyzed Petitioner's arguments and determined there was no economic motive, or indeed any other meaningful evidence of a "conspiracy." The absence of any economic motive materially undercut Petitioner's theory at trial that there was a conspiracy in which Jerald sought seeking to capture or corrupt the USTA rulemaking process. The Sixth Circuit agreed. No economic motive caused the USTA to prefer a traditional design over a newer

one. The sure conclusion from the Record was that "Super Sulky's conspiracy claim is based upon circumstantial evidence, coincidence, and speculation." 174 F.3d, at 738.[2] These findings applied the Sherman Act in a straightforward manner which should remain undisturbed by this Court.

Throughout this case Petitioner has dodged the impact of this Court's precedents derived from economic reality, in attempting to argue that economic motive is irrelevant when analyzing ambiguous evidence of "conspiracy." (Pet. at 20) Most tellingly, Petitioner could only say – after two weeks of trial – "I think its improper to interject motive ... [s]tupidity and craziness and inexplicable reasons are all perfectly fine and account for most misbehavior in the world." (Transcript of jury charge conference, App. to Petition at D-3; see also trial court opinion, App. at B-14, fn. 6). The law is not so cavalier.

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[2] Indeed, whether the Record contained sufficient evidence to send the case to a jury at all was troublesome. For instance, in a Report and Recommendation issued on Respondent's Civil Rule 56 Motion, a Magistrate Judge concluded Petitioner "failed to produce evidence excluding the possibility that the USTA acted independently." (Appendix to Petition, pg. C-18). The District Judge disagreed because he felt "the Magistrate placed too heavy a burden on Cheetah at the summary judgment stage" (Appendix C-14), relying in part on the allegation, unproven at trial, that the USTA process was corrupted by one or more sulky manufacturers.

Cases upon which Petitioner relies, particularly *United States v. General Motors Corp.*, 384 U.S. 127 (1966), do not suggest a lesser standard of evidence ought to be required. *GM* addressed a situation in which there was direct evidence of a horizontal conspiracy between competing retail dealers and the issue was whether GM was a party to such conspiracy. While the evidence presented in *GM* warranted that holding, nothing comparable showing joint and collaborative conduct was presented here. Similarly, the USTA rulemaking process was not captured or corrupted as it had been in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Absent corruption of the process such as was evident in *Allied Tube*, *supra*, the general premise prevails, namely that private organizations which promulgate standards using "procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... can have significant procompetitive advantages." 486 U.S., at 501.

Petitioner attempts to distinguish *Matsushita* and *Monsanto*. But in those cases the question presented was whether evidence of parallel conduct was itself a sufficient basis for a jury finding of any "conspiracy." Without parallel behavior there would have been no evidence at all of conspiracy in *Matsushita*. In *Monsanto* there was evidence other than mere parallel behavior to support a finding of conspiracy. Neither decision stands for a notion that without

parallel behavior one can infer a "conspiracy" from nothing.

B. Industry Standard setting and Rulemaking

The approach advocated by Petitioner in its Questions Two and Three would have a pernicious impact on many types of rule-making and standard-setting organizations. In a wide variety of such organizations beneficially impact American life.

Rulemaking is essential in sports. Disruption of our society's attachment to sporting events would surely follow if the test for finding a "conspiracy" under §1 of the Sherman Act were seriously relaxed, as Petitioner asks. Basketball, tennis, auto racing, golf, hockey and bridge have all been the target of antitrust attacks based on rule-making to maintain the essential elements of such sports.[3] Moreover, eligibility

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[3] *E.g., M & H Tire Co., Inc. v. Hoosier Racing Tires Corp.*, 733 F.2d 973, 986 (1st. Cir. 1984) (tire standardization in auto racing; a case similar in many ways to this one); *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781 (7th Cir. 1981) (use of horse racing data); *Gunter Harz Sports, Inc. v. U.S.T.A., Inc.*, 511 F.Supp. 1103 (D. Neb. 1981) (specifications for tennis rackets); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979) (safety rule that forbid player blind in one eye from participation in professional hockey); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 653 (5th Cir. 1977) (standards for horses); *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365, 1370 (9th Cir. 1970) (requirements to be recognized as an official ACBL bridge tournament); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968) (standardization

rules in college sports, and other collateral matters have likewise been attacked under the Sherman Act. *R.M. Smith v. National Collegiate Athletic Association*, 139 F.3d 180 (3rd Cir.) *cert. denied* in No. 98-107, 119 S.Ct. 170 (1998).

Sports is not the only field in which non-governmental rule-making or standard-setting operates. The recent decision in *DM Research v. College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999) offers an example of standard setting in another area, namely reagent water used in laboratories, which resulted in a challenge under §1 of the Sherman Act. *DM Research* reflects the quickness – even under existing law - with which those unhappy with new rules or standards attempt antitrust lawsuits. The decision also demonstrates that the legal rules currently used to analyze rule-making under §1, promulgated by this Court in the mid-1980's, remain well understood and yield predictable practical justice. Organizations like the USTA across America benefit from the certainty in existing law.

The well-reasoned opinion in *DM Research* recognized that, while standard-setting or rule-making processes can be corrupted, as was the situation presented in cases like *Allied Tube & Conduit Corp, supra*, and *American*

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of lubricants for auto races); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (qualification tests to play in professional golf tournaments); *see also*, *Chicago Prof. Sports Ltd. v. Nat. Basketball Ass'n.*, 95 F.3d 593 (7th Cir. 1996) (broadcast rules).

Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), those examples do not justify expensive litigation every time someone disagrees with a new rule or standard set by some private organization. Petitioner proposes nothing but that outcome with its Questions Presented here, since there was no evidence of the capture or corruption of the USTA rulemaking process. Answering either Questions Two or Three in the manner sought by Petitioner would implicitly condemn those who participate, often as volunteers, in sports and industry-based standard setting and rulemaking to frequent, expensive litigation in the wake of regulatory decisions. Henceforth, mere collaborations, chance encounters at meetings, or personal friendships among "knowledgeable people committed to the best interests of the sport," as the Court of Appeals termed the members of the Committee (174 F.3d, at 739) would, if Petitioner's view were applied, be enough to provide *prima facia* evidence of the key "conspiracy" element required by §1. In other words, it would seem that all three Questions Presented could result in equating even the most innocent actions taken "jointly and collaboratively" with a "conspiracy." Upon this precise issue *Monsanto*, *Matsushita*, and *Riverview* all demanded much more.

Petitioner's view of the Questions Presented also ignores pretrial management decisions made by the trial judge, and beyond that would apparently shift the burden of proof to allow a plaintiff to focus in the first instance upon whether the so-called restraint imposed by a sports or

industry rule is "reasonable" notwithstanding that almost any rule or standard can be debated on some level. Plaintiff would ask federal juries to sit and review sports or industry rules without first requiring any meaningful evidence of an unlawful "conspiracy." This conclusion surely follows from close examination of a leading argument advanced by Petitioner, namely that "the USTA lacked any concrete evidence that Cheetahs were less safe than other sulkies" (Pet. at 12). The First Circuit wisely saw the flaw in an approach which focuses upon the outcome of rulemaking rather than the fairness of the process followed:

> [I]t is commonplace, and often very useful, for organizations to recommend quality standards (like National) or adopt them as part of a certification process (like the College). Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as "unreasonable" under the Sherman Act. A few cases say this explicitly [citation omitted], but more important, something else or more extreme is generally present in the cases that have condemned quality standards as anticompetitive.
>
> In such cases, the principal concern has been the use of standards setting as a predatory device by some competitors to injure others; normally there is a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or other improper forms

> of influence, in addition to a further showing of market foreclosure. [citation omitted] Without some kind of protective screen for treble damage liability, there would be few standards set since most involve disputable judgment calls.
>
> *D. I Research, supra*, at 57-58.

No reason exists to reconsider fifteen years of well-accepted precedent developed since *Monsanto*. Disrupting the orderly application of §1 of the Sherman Act is unjustified by anything in the Petition, or in current academic literature. Absent any evident misunderstanding among the Circuits, disruption of the orderly analysis of cases under §1 of the Sherman Act - inherent in the extreme positions set out in the Questions Presented - counsels strongly against grant of the Writ. The result reached by the Sixth Circuit in this case demonstrates a good grasp of the judicial analysis required, including the practical need to search out the economic motive(s) of alleged co-conspirators. Wisely, this Court has not seen fit to interpret the Sherman Act in a way which would force litigants through expensive antitrust proceedings whenever, in the words of the First Circuit, "a plaintiff has nothing more than unlikely speculations" because the law must "protect society from the costs of highly unpromising litigation." 170 F.3d, at 56.

C. Other Questions Presented

To avoid waiver under this Court's Rule 15.2, Respondent would note that a grant of Certiorari on any of the Questions Presented might then require resolution of the following issues, which were not necessary to the decisions in the lower courts. First, given the factual finding that there was no economic motive for the USTA's conduct, and given longstanding caselaw accepting as fundamental that the antitrust laws only regulate commercial activity, as opposed to noncommercial conduct such as rulemaking, could the USTA have any legal liability on these facts (assuming they were re-proven at the new trial granted by the trial judge)? Caselaw such as *Smith v. NCAA, supra,* 139 F.3d, at 185-187, and *Virginia Vermiculite Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 540-41 (4th Cir. 1998) suggests that rulemaking like that challenged here is outside the scope of analysis under the Sherman Act.

Second, virtually all of the conduct at issue here took place within the Committee. While created and operated by the USTA, to be sure, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), cooperation within a single entity like the USTA and its Committee of volunteers does not normally qualify as an actionable "conspiracy" under §1. *See, Chicago Prof. Sports Ltd. v. NBA, supra,* 95 F.3d, at 598-600. For reasons having to do with the way the case was pleaded the only claim tried to the jury was predicated upon conduct external to the USTA (namely the alleged conspiracy with Jerald). However, the

applicability of *Copperweld* would be presented in response to certain arguments of Petitioner (Pet. at 21 – 23) were one to ignore the holding below that Petitioner was untimely in raising such arguments in this case "nearly three years after its filing and far beyond the close of discovery." (App. C-34)

Third, because the dominant feature in the regulation of harness racing is individual state racing commissions, the application of the *Noerr-Pennington* doctrine to these facts is another serious issue if one were to get past the absence of a "conspiracy."

CONCLUSION

For all the reasons stated, the Petition should be denied.

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Supreme Court
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Nº. 99-67

In The
Supreme Court of the United States

SUPER SULKY, INC.,
Petitioner,

v.

U.S. TROTTING ASSOCIATION,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S FACTS

Petitioner disagrees with certain of Respondent's factual characterizations.[1] For instance, contrary to Respondent's contention (USTA Brf. at 8), the record *does* support Petitioner's contention that, prior to the taking of the drivers' poll, members of the IWSC intended to make the "modified" (*i.e.*, the traditional) sulky *the* standard and were "sure" that the early drafts of the rule would eliminate the Cheetah. (App. G-I, attached hereto). Additionally, although the trial court admitted the drivers' poll into evidence, the jury was instructed that "the results of the poll do not, standing alone, constitute any proof as to the safety or lack of safety of the Cheetah...." (App. J, attached hereto). Respondent's suggestion that the IWSC's proposed ban had no force and effect of its own on the sulky market was also effectively refuted at trial; the evidence established that, to participate in harness racing as an owner, driver, or trainer, one had to be a USTA member, and that USTA members are bound by USTA

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[1] Although not critical to the Petition's merits, Petitioner adamantly disputes Respondent's assertion that to suggest that the issue of parity "first surface[d]" upon the USTA's consultation of Professor Meeks misrepresents the factual record. (USTA's Brf. at 4, n. 1). The Petition was worded so as *not* to suggest that the issue of parity "first surfaced" when Mr. Meeks was consulted, but that it first came "into the spotlight" (*i.e.*, became a more significant issue) when he joined the defense team. The record at trial indicated that although the issue of parity in races was mentioned during the sulky controversy, it was not the main focus of the rulemaking process, and the rule was publicized by the IWSC as a "safety" rule.

rules, violation of which can subject the members to fines, suspension, or expulsion. Thus, although if a USTA rule conflicted with a State Racing Commission rule, the USTA's rule would have to give way, barring such conflict, the membership understood that a USTA sulky ban would affect their ability to use (and hence their incentive to purchase) the banned product. As Super Sulky's president testified, following the announcement of the IWSC's proposed standard, Petitioner's sales dropped precipitously, as "[p]eople weren't going to buy a bike that they couldn't use."

It should also be noted that the "one knowledgeable observer" whose testimony the USTA touts as proving the sulky market's "strong" competitiveness following the ban (USTA's Brf. at 10) is none other than William Card, the president of alleged conspirator Jerald Sulky.

REPLY TO RESPONDENT'S ARGUMENT

A. The Law As To Petitioner's First Issue Is Not Well-Settled.

Respondent provides no satisfactory answer to the first issue presented in the Petition. Petitioner challenges *Riverview Investments*[2] "conspiracy" test as not being a proper statement of the law; Respondent answers that it *must be* correct as the appellate court had no difficulty in applying

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2 *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990).

it here, or as other courts have followed similar analyses in evaluating the existence of antitrust conspiracy. Respondent's answer thus begs the question, and never moves any closer towards validating *Riverview Investments*' test as a proper statement of law. This is the legal issue which demands resolution, and upon which this appeal turns. If *Riverview Investments* is incorrect, then so is the ruling that deprived Petitioner of its jury verdict. If *Riverview Investments* is incorrect, then so is the Sixth Circuit's published opinion which will continue to propagate incorrect analyses.

Petitioner is not disputing the validity of *Monsanto*[3] and *Matsushita*[4] as applied to their proper contexts: to assessing the existence of a conspiracy inferred from the alleged conspirators' ambiguous parallel conduct. But where, as here, the conspirators' conduct was purely collective or collaborative in nature; where, as here, the alleged conspirators *could not have achieved the restraint in question without each others' help*; then, it defies sound analysis to inquire into their motivations as a means of determining whether they pursued an agreed course of conduct. An agreement is no less an agreement simply because the contracting parties have independent reasons for entering into

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Monsanto Corp. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

4

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 572 (1986).

it.

This Court should thus accept review of this case to clarify the proper analysis that will determine the existence of an antitrust conspiracy when the conduct alleged is joint and collaborative, as opposed to being merely parallel.

B. <u>Respondent's Treatment Of Petitioner's Second And Third Issues Highlights The Importance Of This Controversy.</u>

By addressing the Petitioner's second and third issues jointly, Respondent avoids having to admit that the rulemaking of private standard setting organizations is commonly treated as a conspiracy among the membership. Indeed, of the sports rulemaking cases cited at n. 3 of Respondent's Brief, *none* were disposed of on a finding that no "conspiracy" was proven; and *none* suggested that the rulemaking of private sports sanctioning organizations is in any sense immune from antitrust scrutiny. Rather, *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977), *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *Deesen v. PGA*, 358 F.2d 165 (9th Cir. 1966), *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n, Inc.*, 511 F.Supp. 1103 (D.Neb. 1981), and *STP Corp. v. U.S. Auto Club, Inc.*, 286 F.Supp. 146 (S.D.Ind. 1968) all involved bench trials where the trial court, after full-blown Rule of Reason analysis, concluded that the procompetitive benefits of the rule outweighed its

anticompetitive effects. *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984) also resulted from bench trial factual findings, but the appellate court reversed on the ground that the evidence did not support a § 1 violation, given that the "single tire rule" (unlike the ban here) was limited in terms of time and geographically. Finally, *U.S. Trotting Ass'n v. Chicago Downs*, 665 F.2d 781 (7th Cir. 1981) involved a reversal of a trial court's ruling that a *per se* analysis applied; the appellate court remanded for a determination of "whether the challenged conduct 'went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purpose was asserted for it.'" *Id.* at 790.

Respondent would have this Court believe there is something radical in the notion that a private association's rulemaking should be treated as a conspiracy of the members. Yet, the NCAA[5], the AMA[6], the National Society of Professional Engineers[7], various federations of dentists[8], and

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NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); *Law v. NCAA*, 902 F.Supp. 1394 (D.Kan. 1995), *aff'd* 134 F.3d 1010 (10th Cir. 1998).

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Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983).

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National Society of Professional Engineers v. United States, 435 U.S. 679 (1984).

even coalitions of Ivy League universities[9], have all been subject to antitrust scrutiny as a result of their rulemaking functions. Indeed, the very case which Respondent brandishes as revealing the "flaw" in Petitioner's argument itself concedes that private rulemaking is often treated as a conspiracy of the members, for, "[a]fter all, such organizations may, at least in some of their functions, operate essentially as a means of coordinating the actions of their independent members." *DM Research Inc. v. College of American Pathologists*, 170 F.3d 53, 57 (1st Cir. 1999).[10]

As to the remainder of Respondent's arguments, far from being reasons to deny the Petition, they emphasize that the questions presented involve critical matters of antitrust policy that this Court's jurisprudence does not fully address. Petitioner does not dispute that rulemaking is essential in sports. Yet this does not mean that *all* rulemaking of private sports regulatory organizations is beneficial or procompetitive; nor does it mean that such rulemaking should

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California Dental Ass'n v. FTC, __ U.S. __, 119 S.Ct. 1604 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

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United States v. Brown University, 5 F.3d 658 (3rd Cir. 1993).

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DM Research is readily distinguishable from this case. Not only did *DM Research* ***not*** reject the notion that a conspiracy existed, but the standard in *DM* was merely advisory and did not result in complete market foreclosure of the product in question.

enjoy blanket immunity from antitrust scrutiny. As this Court recently recognized, the anticompetitive threat posed by the activities of non-profit organizations is more insidious than that of for-profit organizations, for non-profit associations can hide behind "a screen of superficial disinterest" while pursuing the interests of their for-profit members. *California Dental Ass'n*, *supra*, at 1612.

Respondent contends that the law must allow for quick disposition of knee-jerk challenges to private rulemaking that might threaten the existence of organizations whose rule-making benefits society. Yet, the flip-side of that coin is that where, as here, the private association's rulemaking deprives the consuming public of a product for which there is high demand, and forces from the market a strong new competitor who, through valid competition, threatens the status quo, *that* kind of rulemaking requires scrutiny by the courts if the goals of the Sherman Act are to be realized. For, in the end, the Sherman Act's paramount goal is to protect and promote economic competition; it is *not* to ensure that entities are immunized from lawsuits to which they have subjected themselves by presuming to control the operation of free markets.

CONCLUSION

Accordingly, the petitioner, Super Sulky, Inc., respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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August 1999

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

(Excerpt from the testimony of Kent Hastings)

U.S. District Court Case No. 93-CV-1814
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Pages G-1 thru G-3

IN THE UNITED-STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

APPEARANCES:

For the Plaintiff: Joel L. Levin, Esq.
John A. Huettner, Esq.
Nurenberg, Plevin, Heller &
1370 Ontario St. - 1st Floor
Cleveland, Ohio 44113-1792

For the Defendant: John J. Chester, Esq.
Donald C. Brey, Esq.

Richard A. Frye, Esq.
Chester, Willcox & Saxbe
17 South High St. - Suite 900
Columbus, Ohio 43215

Court Reporter: Richard G. DelMonico
425 U.S. District Court
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

A. I haven't looked for it.

Q. Well, what did you write after you wrote the Jerald numbers now in 3 B, what do you say in parentheses after 3 B in your writing?

A. It says "eliminates Cheetah style bikes".

Q. And then it has an arrow pointing 42 to 50, right?

A. Yes.

Q. And the Cheetah style of that measurement is 19?

A. Right?

I can tell you what that note says, I don't know if that's what it relates to or not.

Q. And these drafts were all done before the pole, correct?

A. Yes.

Q. It doesn't say, does it, eliminates bent shaft? It says eliminates Cheetah style, correct?

A. That's what it says.

MR. LEVIN: I have no further questions.

THE COURT: You want to turn this off or are you through with this?

MR. LEVIN: Sure. Pardon me, your Honor.

THE COURT: Any redirect?

MR. BREY: None, your Honor.

THE COURT: You may step down, thank you.

Please call your next witness.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

(Excerpts from the testimony
of Placido "Pat" Salerno)

U.S. District Court Case No. 93-CV-1814
Filed September 5, 1997

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Pages H-1 thru H-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 28, 1997 AT 8:35 O'CLOCK A.M.

– – –

APPEARANCES:

For the Plaintiff:	Joel L. Levin, Esq. John A. Huettner, Esq. Nurenberg, Plevin, Heller & 1370 Ontario St. - 1st Floor Cleveland, Ohio 44113-1792
For the Defendant:	John J. Chester, Esq. Donald C. Brey, Esq.

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Court Reporter: Richard G. DelMonico
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Two South Main Street
Akron, Ohio 44308
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there not?

A. Are you saying the June 2nd meeting? I'm sorry.

Q. Yes, there is a June 2nd meeting?

A. Was that the USTA one?

Q. That was at that time USTA?

A. All right.

Q. And showing you exhibits YYY 1, the Industry Wide Sulky Committee draft for June 2nd, 1993. Have you ever seen this before?

A. Yes, I've seen this.

Q. You were co-chair of the Committee?

A. That's correct.

Q. Now, looking through it, there are various measurements; on pages 2, 3, 4, 5, 6, 7, there are various measurements, right?

A. Correct.

Q. Where did they come from, sir?

A. They came from discussion at the meetings.

Q. Well, they were already there when you arrived at the June 2nd meeting, right?

A. No, not all of them. Most of them were parentheses with nothing in.

Q. Well, the ones that were printed, sir, where did they come from?

A. I don't know.

Q. They just appeared at the June 2nd meeting, is that your testimony?

A. I don't know where they came from.

Q. Did you ever ask anybody why they were there, why they were the starting point?

A. Not particularly.

Q. As co-chair of the Committee you had no interest in who authored this paper and where they got the measurements, is that your testimony?

A. Well, I presume they must have come from something for us to start with.

Q. And did you ever question where they came from?

A. I don't believe I did.

Q. Do you know who drafted them?

A. No, I don't.

Q. Do you know what the basis for the measurements were in the original proposal?

A. No, I really don't.

Q. Okay. So, just so it's clear, Mr. Salerno, you have no idea at all how the original specifications that were the starting point came to arise in this June 2nd draft, is that right?

A. My intention is they were taken off a modified sulky and that's what we started with.

Q. That's different than what you just told me. Why do

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 21, 1997 AT 8:28 O'CLOCK A.M.

(Excerpts from the testimony of Glen Huber)

U.S. District Court Case No. 93-CV-1814
Filed July 22, 1997

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Pages I-1 thru I-5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al.	)
Plaintiff,	)
	) Civil Action No.
vs.	) 93-CV-1824
	)
U.S. TROTTING ASSN., et al.	)
Defendant.	)

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON MONDAY, JULY 21, 1997 AT 8:28 O'CLOCK A.M.

– – –

APPEARANCES:

For the Plaintiff: Joel L. Levin, Esq.
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1370 Ontario St. - 1st Floor
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For the Defendant: John J. Chester, Esq.

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Court Reporter: Joan Zengler
Caroline Mahnke
U.S. District Court
2 South Main Street - Room 425
Akron, Ohio 44308
(330) 535-1823

Recorded by mechanical stenography; transcript produced by computer-aided transcription.

Wing: He went, he gave a long discussion as to how save the Cheetah was, didn't he, as a representative of New York?

A. He spoke to the committee, yes.

Q. And did he state again and again in a number of ways how safe the Cheetah was?

A. Yes, he stated how he thought that the -- how safe the Cheetah was.

MR. LEVIN: Now, can I have YYY-1, John

BY MR. LEVIN:

Q. I'm going to show you where we were a few minutes ago, YYY-1. It's, I believe, in the jury notebook from the defendants, from the defendant.

See if we can go back through this. YYY-1 was an early draft of the new sulky standards, correct?

A. Yes.

Q. And in those standards there are very specific measurements and distances that have to be met; is that right?

A. Yes.

Q. And would you agree with me, sir, that these standards and these distances would have eliminated the Cheetah Super Sulky?

A. Yes, I'm sure they would have.

Q. Now, what I want to know is as of the time that these standards were drafted, what evidence did you have on June 2

Q. And it says: Since the Cheetah-type sulky has been introduced in our racetrack, we have found far fewer incidents of accidents; do you see that?

A. Yes.

Q. Do you recall that testimony being given to you on the committee:

A. I'm sure it was given. I don't recall it.

Q. Did that testimony figure at all in any way in your -- in the June 2 standards banning the Cheetah, that particular testimony?

A. Well, I'm sure we took all testimony into consideration.

Q. Now, there are a number of -- on Exhibit YYY-1, there are a number of measurements, correct?

A. Yes.

Q. And do you know where those measurements came from?

A. They were introduced to the committee, I believe, by the standardbred breeders and owners in New Jersey.

Q. Do you know how they got them?

A. I believe they got those -- got the measurements from one of the conventional sulkies.

Q. As they measured a conventional sulky and put those standards down; is that right?

A. I believe that's correct.

Q. Do you know whether any of the manufacturers had a hand

in measuring or drafting those original standards?

A. No.

Q. No, you don't know?

A. No.

THE COURT: Do you know who directed they be prepared?

THE WITNESS: No, your Honor.

THE COURT: The committee didn't do that?

THE WITNESS: No.

THE COURT: They were just suddenly presented at this meeting?

THE WITNESS: One of the committee members brought them to the committee meeting.

THE COURT: And who was that?

THE WITNESS: I believe it was -- I believe it would have been Pat Salerno.

BY MR. LEVIN:

Q. I want to show you Exhibit 43. I want you to take a look at -- I'm going to ask you to compare 43 and YYY-1. But first, can you tell us what Exhibit 43 is. Have you ever seen that before?

A. I believe I've seen this.

Q. Okay. It is a sulky specifications meeting, April 17 document, right?

A. Yes. JA 1283

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON TUESDAY, JULY 22, 1997 AT 8:30 O'CLOCK A.M.

U.S. District Court Case No. 93-CV-1814
Filed July 23, 1997

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Pages J-1 thru J-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUPER SULKY, INC., et al._	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	93-CV-1814
	)	
U.S. TROTTING ASSN., et al.	)	
Defendant.	)	

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE THE HONORABLE DAVID D. DOWD, JUDGE OF SAID COURT, ON TUESDAY, JULY 22, 1997 AT 8:30 O'CLOCK A.M.

- - -

APPEARANCES:

For the Plaintiff: Joel L. Levin, Esq.
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For the Defendant: John J. Chester, Esq.

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Court Reporter: Joan Zengler
Caroline Mahnke
U.S. District Court
2 South Main Street - Room 425
Akron, Ohio 44308
(330) 535-1823

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

same level as the seat. All bent-shafts are the feet up high in relation to the seat as a bent shafts. Cheetah style bent shafts also had the feet close together.

THE COURT: The court will take a recess for about five minutes.

(Recess taken, 1:30 to 1:35 p.m.)

THE COURT: The motion of the plaintiff to exclude the results of the poll is denied. I'm going to instruct the jury that I am permitting the witness to offer expert testimony. It is their obligation to scrutinize his testimony as they would the testimony of any other witness.

I'm also going to indicate to the jury that the results of the poll do not, standing alone, constitute proof as to the safety or lack of safety of the Cheetah style or the bent-shaft style sulky.

With exceptions of the plaintiff, we'll proceed.

Do you want to call the witness back, please.

(Jury in, 1:35 p.m.)

THE COURT: Members of the jury, the present witness has been qualified as an expert in his field of survey methods and I will allow him to offer opinions with respect to the survey that was conducted in this case of the drivers.

It is your obligation to scrutinize the opinion of experts the same as you would the testimony of other

witnesses. You may accept all, part or none of what an expert witness has to say just as you may accept all, part or none of what a fact witness has to say.

Moreover, I will permit the defendant to offer the results of the poll, but I caution you that the results of the poll do not, standing alone, constitute any proof as to the safety or lack of safety of the Cheetah-style sulky or the bent-shaft sulky.

You may proceed.

BY MR. BREY:

Q. With the court's permission I will show the witness a copy of the Defendant's Exhibit EEEE-1.

THE COURT: That's the survey itself.

MR. BREY: This is the survey itself.

THE COURT: I believe they have a copy or they can look it up in their -- would you give the number for them again.

MR. BREY: It is four E's dash 1, and it is in the jury notebook of the defendant, the blue one

BY MR. BREY:

Q. Dr. Krosnick, is this Exhibit EEEE-1 the exhibit that -- well, what is that exhibit?

A. This appears to be a copy of the questionnaire that I was given representing the questionnaire that was mailed out to respondents, and it matches the questionnaires that I was